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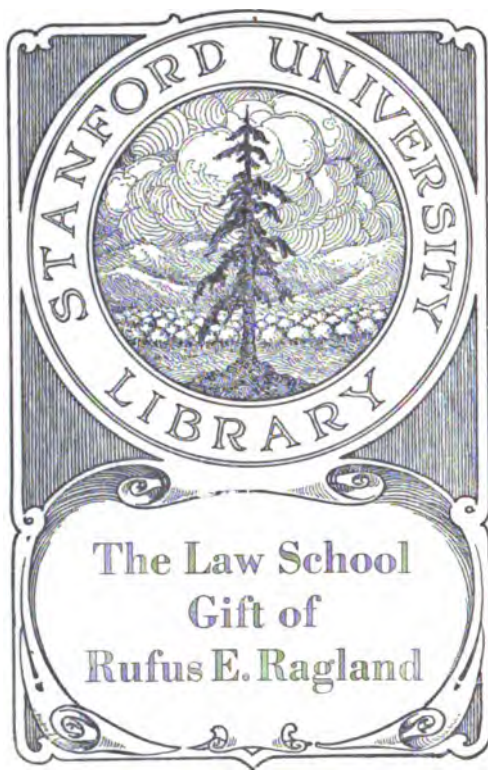
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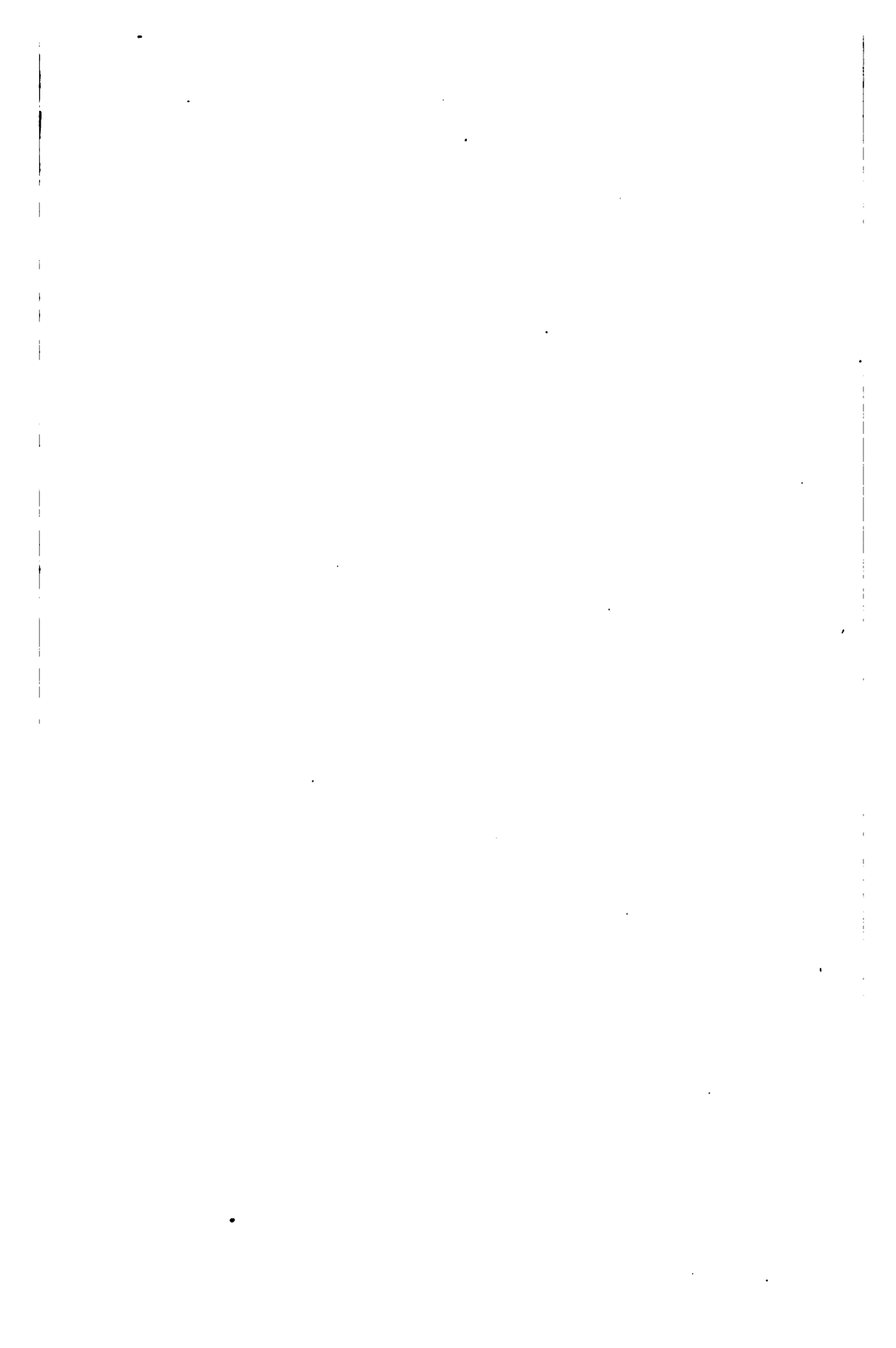
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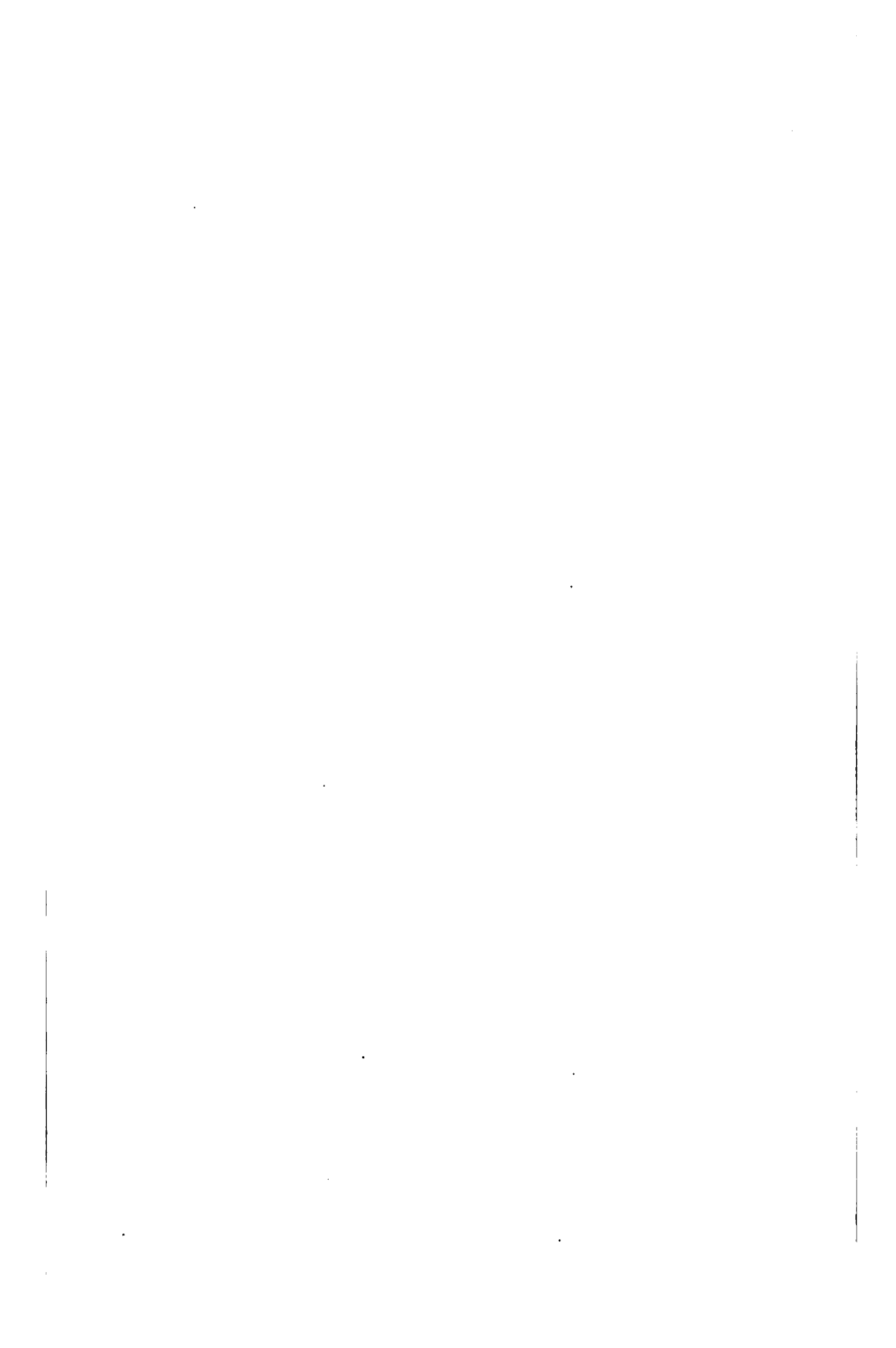
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**THE LAW
OF
PURE FOOD AND DRUGS**

NATIONAL AND STATE

**WITH
APPENDICES CONTAINING FEDERAL STATUTES
RELATIVE THERETO**

**AND
THE REGULATIONS OF THE GOVERNMENT
FOR THEIR ENFORCEMENT**

**BY
W. W. THORNTON
OF THE INDIANAPOLIS BAR
AUTHOR OF LAW OF OIL AND GAS, FEDERAL EMPLOYERS LIABILITY
AND SAFETY APPLIANCE ACT, ETC.**

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PREFACE

In the last few years great interest has been taken in the subject of Pure Food. Statutes that had long been dormant, and never had been enforced, have been revived, as it were, and, in many instances, remodeled and fitted to new conditions. New laws have been enacted. The Federal Pure Food and Drugs Act of June 30, 1906, has acted as an incentive for State legislation on the subject of food and drugs.

The attitude of the manufacturers and vendors of food and drugs has brought about sharp litigation between them and the government—much greater in extent and breadth than many are aware of. The Federal oleomargarine law was the first statute to be attacked, resulting in a long line of cases, which firmly laid down the rules concerning the right and power of the government to protect and guard the health of its inhabitants, as well as its right to protect them from deceit and imposition.

Owing to the complex systems of government under which we live, the States were not able to protect their inhabitants as effectually as was necessary or desirable. They had no power over food that entered into interstate commerce until it was too late adequately to protect the consumer. The Federal Pure Food and Drugs Act of June 30, 1906, is intended to cover the point which the States were not able to reach, and it has been far more efficacious in its provisions than perhaps the law of any State has been for its own citizens.

But the Federal statute does not, by any means, reach all instances of adulterated foods and drugs. By far the greatest quantity of food never passes beyond, and it is never intended that it shall pass beyond, the boundaries of the State. Congress can not regulate the sale of this food. It remains for the State to do so. There have been many statutes enacted

by the States to cover this subject, especially since the adoption of the Federal statute of 1906. There is no State in the Union but what has enacted statutes on the subject of Pure Food and Drugs, and quite a number of them are modeled—at least in part—after this one of 1906.

There has been no legal discussion of the subject of Pure Food and Drugs, in compact form, in this country, except Mr. Arthur P. Greeley's exposition of the Federal statute of 1906. That work was prepared by him within less than a year after the enactment of that statute, and before the rules and regulations for its enforcement had been well tested, and when only a few decisions had been made construing its provisions. Since then many instances have arisen wherein the Department of Agriculture has been called on for decisions in the enforcement of the statute, and the rules and regulations adopted pursuant to its provisions. A large number of cases have reached the courts, usually resulting in victories for the government.

But the government met with signal defeat in its efforts to suppress the entrance into interstate commerce of proprietary medicines where unfounded and false claims are made concerning their efficacy as cures for human ills. This decision¹ of the Supreme Court of the United States necessarily results in overturning a number of decisions made in the District Courts. It has been the author's endeavor to point out each instance in which there is a conflict between the decisions of that department and the decisions of the Supreme Court.

In Part I of this work has been discussed the constitutionality of the statutes, the validity of the ordinances and regulations, concerning Pure Food and Drugs, and the powers of the States and municipalities to regulate and to prohibit, if necessary, their sale.

In Part II has been discussed at length the Federal Pure Food and Drugs Act of June 30, 1906. All the Food Inspection Decisions made and Notices of Judgments issued by the

¹ United States v. Johnson, 31 Supreme Court Reporter, 627.

Department of Agriculture, up to the date of going to press, have been cited, it is believed, with possibly a very few exceptions, and many of the former quoted at length. In the exposition of this statute, and in his labors, the author has been greatly assisted by official documents and literature construing the statute furnished by the Department of Agriculture, and his thanks are especially due to Dr. W. H. Wiley in this respect.

Part III consists of a review of the State, English, Irish, Scotch, and Australian decisions of the courts, in appropriate chapters and under proper headings. This, as well as Part I, is a phase of the work never before systematically undertaken in America. In England a very excellent work—Bell's—gives a clear exposition of the several statutes and the many decisions on the subject of Pure Foods. The author has availed himself of the labors of this painstaking and accurate writer whenever applicable, often quoting him at length. Practically all of the English and Colonial cases have been reviewed and cited in this present work—an unusual practice in an American work—but the writer has felt that these foreign cases would be of decided benefit to the practitioner, as well as to pure food and drug officers and boards in the enforcement of their statutes.

A painstaking effort has been made to cite all American cases—and the author believes he has succeeded—and to give, not only the official citation, but also the citation to the West System of Reporters, the American Decisions, American Reports, American State Reports, and Lawyers' Reports Annotated, when the case was reported therein.

In the Appendices have been inserted at length the Federal Pure Food and Drugs Act of June 30, 1906, the Rules and Regulations of the Department of Agriculture relating thereto, the Federal statutes relating to Filled Cheese; Inspection of Articles of Food, Drink, and Medicines; Inspection of Tea; Labels and Brands as to State of Production; Importation of Drugs and Medicines; Importation of Opium; Inspection of Imported and Exported Foods and Drugs; Oleomargarine; Adulterated Butter (the official edition, with rules and regu-

lations and annotations); the Meat Inspection Law of March 4, 1907, with rules and regulations (the official edition), and the Insecticide Act of 1910, with the official rules and regulations. All these statutes are, in a way, related to each other.

It was the original intention of the author to insert the statutes of all the States relating to Pure Foods, with the several State regulations adopted for their enforcement, but, after having made a partial collection of them, it was found that they would render this work entirely too large, the printing of which would entail a cost not justified by the advantages to be obtained thereby. The Federal Department of Agriculture prints these State statutes for gratuitous distribution, and many States gratuitously furnish their own. Besides these reasons for not inserting them in this work is the further reason that many of them are frequently changed by the Legislatures, every year changes being made in some of them.

W. W. THORNTON.

Indianapolis, Ind.,
December 1, 1911.

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THE LAW OF PURE FOOD AND DRUGS

PART I

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§ 1. What is Food.

The word "food" includes whatever is eaten or drunk by man; and therefore includes milk,¹ and the word "milk" used in statute in its general sense includes cream.² "Con-diment" is a food and not a medicine.³ Whisky is a drug under the Ohio statutes,⁴ nor is drink a food under the Pennsylvania statute of 1895.⁵ The fact that a "food" may also

¹ Commonwealth v. Hartman, 19 Pa. Co. Ct. Rep. 97, 6 Pa. Dist. Rep. 136; State v. Smith, 69 Ohio St. 196, 68 N. E. 1044.

² Commonwealth v. Gordon, 159 Miss. 8, 33 N. E. 709; St. Louis v. Ameln, (Mo.), 139 N. W. 429; State v. Stone, 46 La. 147, 15 So. 16.

³ Savage v. Scovel, 171 Fed. 566.

⁴ State v. Hutchinson, 56 Ohio St. 82, 46 N. E. 71.

⁵ Commonwealth v. Kebort, 212 Pa. 289, 61 Atl. 895. P. L. 317. But this was owing to a defect in the statute.

be a medicine or possess medicinal properties does not exempt it from the operation of a statute regulating the sale of foods.⁶ A manufacturer who designates an article made and sold by him as a food is estopped to deny that it is such within the meaning of a statute regulating the sale of food.⁷

§ 2. Exposure for Sale of Unwholesome Food a Common Law Offense.

In any discussion of the power of the Legislature to prevent the sale of impure food and drugs, or to prevent a deception of the public in their sales, it must be borne in mind that at common law it was an indictable offense to wilfully expose unwholesome provisions for sale as food.¹ To

⁶ *Savage v. Scovel*, 171 Fed. 566.

⁷ *Savage v. Scovel*, 171 Fed. 566.

Where a statute provided that "food shall be deemed adulterated if any substance or substances have been mixed with it so as to lower or depreciate or injuriously affect its strength, quality or purity;" and a statute enacted two years later than this one made it a misdemeanor to sell or offer for sale "adulterated" milk for domestic or potable use, it was held that the two statutes were in *pari materia* and must be so read; and that the former applied to the adulteration of milk by adding thereto pure water. "Milk is the food of foods," said the court. "The felicity of the table hinges on milk. Nay, considered by and large, bar milk, and how long would the race itself last? We know, too, that cow's milk is a respectable and common substitute for mother's milk. To injure the young is to grind the seed corn. It being essentially a food, when the Legislature two years later used the word adulterated in con-

nection with food, it was presumably connected in the legislative mind with its prior legislative definition.—a definition on all fours with that of standard lexicographers and with the ordinance" [in question]. *St. Louis v. Austin* (Mo.), 139 S. W. 429.

"Food, in its general sense, is that which nourishes the body without regard to its physical state; that is, it may be solid, liquid or gaseous. More particularly defined, food is that material taken into the body in the ordinary process of eating which contains the elements necessary for the growth of tissues, for the repair of the destruction to which the tissues are subjected during the ordinary vital processes and for furnishing heat and energy necessary to life."—*Wiley, Foods and Their Adulteration* 7.

¹ *State v. Snyder*, 44 Mo. App. 429; *State v. Smith*, 3 Hawks (N. C.) 378, 14 Am. Dec. 594; *State v. Norton*, 2 Ired. L. 40.

mix or knowingly permit servants to mix unwholesome ingredients with any article of food which is intended for sale is also a misdemeanor at common law.² Thus a baker was indicted and convicted at common law who furnished bread to an asylum for children into which, to his knowledge, his servants had introduced alum.³ And a person who knowingly sells food or drugs under a false description may be guilty of obtaining money by false pretenses.⁴

§ 3. Basis for Pure Food Legislation.

At this day and age it seems scarcely necessary to state the ground upon which pure food legislation rests, nor to cite cases in support of it. The right to prevent the sale of impure food, to inspect food, or even destroy it when found impure, rests upon the police power of the State, which remains unimpaired by the Federal Constitution. "Every well organized government has the inherent right to protect the health and provide for the safety and welfare of its people. It has not only the right, but it is a duty and obligation which the sovereign power owes to the public, and as no one can foresee the emergency or necessity which may call for its exercise, it is not an easy matter to prescribe the precise limits within which it may be exercised. It may be said to rest upon the maxim, 'salus populi suprema lex,' and the constitutional guarantees for the security of private rights, relied upon by the appellant, have never been understood as interfering with the powers of the State to pass such laws as may be necessary to protect the health and provide for the safety and good order of society."¹

"Constitutional limitations which declare that no person shall be deprived of his property or liberty without due process of law," have never been construed as being incompatible with

² *Rex v. Dixon* 3 M. & S. 11, 4 Cowp. 12, 15 R. R. 381; *Regina v. Stevenson*, 3 F. & F. 106; *Burnby v. Bollet*, 16 M. & W. 644, 17 L. J. Exch. 190, 11 Jur. (O. S.) 827.

³ *Rex v. Dixon*, supra.

⁴ *Regina v. Foster*, 2 Q. B. Div. 301, 41 J. P. 295.

¹ *Deems v. Baltimore*, 80 Md. 164, 30 Atl. 648, 26 L. R. A. 541, 45 Am. St. 339.

the principle equally vital because essential to the peace and safety, that all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community.² "To justify such interference with private rights, the exercise must have for its immediate object the promotion of the public good, and, so far as may be practicable, every effort should be made to adjust the conflicting rights of the public and the private rights of individuals. At the same time the emergency may be so great and the danger to be averted so imminent, that private rights must yield to the paramount safety of the public, and to await in such cases the delay necessarily incident to ordinary judicial inquiry in the determination of private rights would defeat altogether the object and purpose for which the exercise of this salutary power was involved. Whatever injury or inconvenience one may suffer in such cases, he is in the eye of the law compensated by sharing the common benefit resulting from the summary exercise of this power, and which, under the circumstances, was absolutely necessary for the protection of the public."³

² *Mugler v. Kansas*, 123 U. S. 623, 31 L. Ed. 205, 8 Sup. Ct. 273.

³ *Deems v. Baltimore*, 80 Md. 164, 30 Atl. 648, 26 L. R. A. 541, 45 Am. St. 339; *People v. Biesecker*, 169 N. Y. 53, 61 N. E. 990, 57 L. R. A. 178, 88 Am. St. 534, affirming 58 N. Y. App. Div. 391, 68 N. Y. Supp. 1067, which affirms 33 N. Y. Misc. Rep. 35, 68 N. Y. 134; *State v. Nelson*, 66 Minn. 166, 68 N. W. 1066, 34 L. R. A. 318, 61 Am. St. 399; *State v. Broadbelt*, 89 Md. 565, 43 Atl. 771, 45 L. R. A. 433, 73 Am. St. 201; *State v. Schlencker*, 112 Iowa 642, 84 N. W. 698, 51 L. R. A. 347, 84 Am. St. 360; *State v. Crescent Creamery Co.* 83 Minn. 284, 86 N. W. 107, 54 L. R. A. 466, 85 Am. Rep. 464; *People v. Marx*,

99 N. Y. 377, 52 Am. Rep. 34, 2 N. E. 29; *People v. Gibson*, 109 N. Y. 389, 17 N. E. 343, 4 Am. Rep. 465; *People v. Girard*, 145 N. Y. 105, 39 N. E. 823, 45 Am. Rep. 595; *Gundling v. Chicago*, 177 U. S. 183, 20 Sup. Ct. 633, 44 L. Ed. 725; *Isenhour v. State*, 157 Ind. 517, 62 N. E. 40, 87 Am. St. 228; *Sanders v. Commonwealth*, 117 Ky. 1, 25 Ky. L. Rep. 1165, 77 S. W. 358, 1 L. R. A. (N. S.) 932, 111 Am. St. 219; *People v. Van de Carr*, 199 U. S. 552, 26 Sup. Ct. 144, 50 L. Ed. 305, affirming 175 N. Y. 440, 67 N. E. 913, 108 Am. St. 781, affirming 81 N. Y. App. Div. 128, 80 N. Y. Supp. 1108; *Jacobson v. Massachusetts*, 197 U. S. 11, 25 Sup. Ct. 358, 49 L. Ed. 643, affirming 183 Mass. 242, 67 L. R. A. 85, 66 N. E. 719;

§ 4. Legislative Determination that Certain Articles of Food are Detrimental to Health.—Oleomargarine.

It is a legislative prerogative to determine whether a certain article of food is detrimental to the health of the inhabitants of the State, and with that determination the courts

- Davis v. Massachusetts, 167 U. S. 43, 17 Sup. Ct. 731, 42 L. Ed. 71, affirming 162 Mass. 510, 26 L. R. A. 712, 44 Am. St. 389, 39 N. E. 113; Wilson v. Eureka City, 173 U. S. 32, 19 Sup. Ct. 317, 43 L. Ed. 603, affirming 15 Utah 53, 48 Pac. 41; State v. Layton, 160 Mo. 474, 61 S. W. 171, 62 L. R. A. 163, 83 Am. St. 407; Stolz v. Thompson, 44 Minn. 271, 46 N. W. 410; State v. Sherod, 80 Minn. 446, 83 N. W. 417, 50 L. R. A. 660, 81 Am. St. 268; State v. Crescent Creamery Co., 83 Minn. 284, 86 N. W. 107, 54 L. R. A. 466, 85 Am. St. 464; Butler v. Chambers, 36 Minn. 69, 30 N. W. 308, 1 Am. St. 644; Kansas v. Cook, 34 Mo. App. 669; Helena v. Dwyer, 64 Ark. 424, 42 S. W. 1071, 39 L. R. A. 266, 62 Am. St. 206; Commonwealth v. Vandyke, 13 Pa. Super. Ct. 489; Commonwealth v. McCann, 14 Pa. Super. Ct. 221; Holtgreive v. State, 7 Ohio N. P. 389, 5 Ohio S. & C. P. Dec. 166; Commonwealth v. Diefenbacher, 14 Pa. Super. Ct. 264; McCann v. Commonwealth, 198 Pa. 509, 48 Atl. 470; State v. Rogers, 95 Me. 94, 49 Atl. 564; McAllister v. State, 94 Md. 290, 50 Atl. 1046; State v. Capitol City Dairy Co. 62 Ohio St. 350, 57 N. E. 62, 57 L. R. A. 181; affirmed 183 U. S. 238, 22 Sup. Ct. 120, 46 L. Ed. 171; People v. Rotter, 131 Mich. 250, 91 N. W. 167, 9 Det. Leg. N. 284; Commonwealth v. Seiler, 20 Pa. Super. Ct. 260; State v. Myers, 42 W. Va. 822, 26 S. E. 539, 35 L. R. A. 844, 57 Am. St. 887; State v. Bockstruck, 136 Mo. 335, 38 S. W. 317; Collins v. New Hampshire, 171 U. S. 30, 18 Sup. Ct. 768, 43 L. Ed. —; Armour Packing Co. v. Snyder, 84 Fed. 136; Schollenberger v. Commonwealth, 171 U. S. 1, 18 Sup. Ct. 757, 43 L. Ed. 49, reversing 170 Pa. 284, 30 L. R. A. 396, 33 Atl. 82, 5 Inters. Com. Rep. 506, 170 Pa. 296, 33 Atl. 85; Wright v. State, 88 Md. 436, 41 Atl. 795; People v. Worden Grocer Co., 118 Mich. 604, 77 N. W. 315; People v. Freeman, 242 Ill. 373, 90 N. E. 366; Commonwealth v. McDermott, 224 Pa. 95, 73 Atl. 427, 37 Pa. Super. Ct. 1; People v. Fried, 133 N. Y. Misc. App. 889, 118 N. Y. Supp. 1131; People v. Simpson-Crawford Co., 133 N. Y. Misc. 889, 118 N. Y. Supp. 1132; People v. Hale, 62 N. Y. Misc. 240, 114 N. Y. Supp. 945; Plumley v. Massachusetts, 155 U. S. 461, 15 Sup. Ct. 154, 39 L. Ed. 223, affirming 156 Mass. 236, 30 N. E. 1127, 15 L. R. A. 839; In re Brosnahan, 18 Fed. 62; Powell v. Pennsylvania, 127 U. S. 678, 8 Sup. Ct. 992, 1257, 32 L. Ed. 253, affirming 114 Pa. St. 265, 7 Atl. 913, 60 Am. Rep. 350; Walker v. Commonwealth, 127 U. S. 699, 8 Sup. Ct. 997, 32 L. Ed. 261; State v. Snow, 81 Iowa 642, 47 N. W. 777, 11 L. R. A.

can not interfere. Thus the Legislature of the State of Pennsylvania provided that no person, firm or corporation should "manufacture out of any oleaginous substance or any com-

- 355; *Pierce v. State*, 63 Md. 592; *McAlister v. State*, 72 Md. 390, 20 Atl. 143; *Commonwealth v. Evans*, 132 Mass. 11; *Butler v. Chambers*, 36 Minn. 69, 30 N. W. 308; *State v. Aslesen*, 50 Minn. 5, 52 N. W. 220, 36 Am. St. 620; *Weidman v. State*, 55 Minn. 183, 56 N. W. 688; *State v. Campbell*, 64 N. H. 402, 13 Atl. 585; *People v. Cipperly*, 101 N. Y. 634, 4 N. E. 107, reversing 37 Hun 319; *People v. Eddy*, 59 Hun 615, 12 N. Y. Supp. 628; *Walker v. Commonwealth (Pa.)*, 11 Atl. 623; *Commonwealth v. Paul*, 148 Pa. 559, 24 Atl. 78; *Noel v. People*, 187 Ill. 587, 58 N. E. 616, 52 L. R. A. 287, 79 Am. St. 238; *Sadler v. People*, 188 Ill. 243, 58 N. E. 906; *Gillespie v. People*, 188 Ill. 176, 58 N. E. 1007, 52 L. R. A. 283, 80 Am. St. 176; *Gloversville v. Enos*, 35 N. Y. Misc. Rep. 724, 72 N. Y. Supp. 398; affirmed 70 N. Y. App. Div. 326, 75 N. Y. Supp. 245; *Arbuckle v. Blackburn*, 113 Fed. 616, 51 C. C. A. 122; *Commonwealth v. Kevin*, 202 Pa. 23, 51 Atl. 594, 90 Am. St. 613; *Crossman v. Lurman*, 171 N. Y. 329, 63 N. E. 1097, affirming 57 N. Y. App. Div. 393, 68 N. Y. Supp. 311; *People v. Braested (N. Y.)*, 51 N. Y. Supp. 824; *State v. Luther*, 20 R. I. 472, 40 Atl. 9; *Dorsey v. State*, 38 Tex. Cr. 527, 44 S. W. 514, 40 L. R. A. 201, 70 Am. St. 762; *Chicago v. Schmidinger*, 243 Ill. 167, 190, 90 N. E. 369, 372; *Rigbers v. Atlanta*, 7 Ga. App. 411, 66 S. E. 991; *Salt Lake City v. Howe*, 37 Utah —, 106 Pac. 705; *State v. Milwaukee*, 140 Wis. 38, 121 N. W. 658; *Commonwealth v. Dougherty*, 39 Pa. Super. Ct. 338; *Red C. Oil Mfg. Co. v. Board*, 172 Fed. 695; *State v. Perry*, 151 N. C. 661, 65 S. E. 915; *Evans v. Chicago & N. W. Ry. Co.*, 109 Minn. 64, 122 N. W. 876; *Mantel v. State*, 55 Tex. Cr. App. 456, 117 S. W. 855, 131 Am. St. 818; *Sue Lung v. State (Tex. Cr. App.)*, 117 S. W. 857; *People v. Owen (N. Y.)*, 116 N. Y. Supp. 502; *Smith v. Alphin*, 150 N. C. 425, 64 S. E. 210; *North American Cold Storage Co. v. Chicago*, 211 U. S. 306, 29 Sup. Ct. 101, 53 L. Ed., modifying 151 Fed. 120; *State v. Weeden*, 17 Wyo. 418, 100 Pac. 114; *St. Louis v. Klausmeier*, 213 Mo. 119, 112 S. W. 516; *St. Louis v. Union Dairy Co.*, 213 Mo. 148, 112 S. W. 525; *State v. Great Western Coffee & Tea Co.* 171 Mo. 634, 71 S. W. 1011; *Walton v. Toledo*, 23 Ohio Cir. Ct. Rep. 547; *Beha v. State*, 67 Neb. 27, 93 N. W. 155; *People v. Laesser*, 79 N. Y. App. Div. 384, 79 N. Y. Supp. 470; *People v. Hills*, 64 N. Y. App. Div. 584, 72 N. Y. Supp. 340; *People v. Niagara Fruit Co.*, 173 N. Y. 629, 66 N. E. 1114, affirming 75 N. Y. App. Div. 11, 77 N. Y. Supp. 805; *Norfolk v. Flynn*, 101 Va. 473, 44 S. E. 717, 99 Am. St. 918; *Crossman v. Lurman*, 192 U. S. 189, 24 Sup. Ct. 234, 48 L. Ed. 401, affirming 171 N. Y. 329, 63 N. E. 1097; *People v. Windholz*, 92 N. Y. App. Div. 569, 86 N. Y. Supp. 1015; *In re*

pound of the same, other than that produced from unadulterated milk, or of cream from the same, any article designed to take the place of butter or cheese produced from pure un-

Watson 17 S. D. 486, 97 N. W. 463; Commonwealth v. Kebort, 26 Pa. Super. Ct. 584; People v. Bishoff, 106 N. Y. App. Div. 266, 94 N. Y. Supp. 773, affirming 44 N. Y. Misc. Rep. 12, 89 N. Y. Supp. 709; St. Louis v. Liessing, 190 Mo. 464, 89 S. W. 611, 1 L. R. A. (N. S.) 918, 109 Am. St. 774; St. Louis v. Grafeman Dairy Co., 190 Mo. 492, 89 S. W. 617, 1 L. R. A. (N. S.) 936; Ex parte Hayden, 147 Cal. 649, 82 Pac. 315, 1 L. R. A. (N. S.) 184, 109 Am. St. 183; Jewett Bros. v. Smail, 20 S. D. 232, 105 N. W. 738; St. Louis v. Schuler, 190 Mo. 524, 89 S. W. 621, 1 L. R. A. (N. S.) 928; St. Louis v. Polinsky, 190 Mo. 516, 89 S. W. 625; St. Louis v. Reuter, 190 Mo. 514, 89 S. W. 628; Commonwealth v. Spencer, 28 Pa. Super. Ct. 301; State v. Tetu, 98 Minn. 351, 107 N. W. 953, 108 N. W. 470; State v. Kumpfert, 115 La. 950, 40 So. 365; Ex parte Dietrich, 149 Cal. 104, 84 Pac. 770, 5 L. R. A. (N. S.) 873; People v. Waters, 114 N. Y. App. Div. 669, 100 N. Y. Supp. 177; Metropolitan Milk & Cream Co. v. New York, 113 N. Y. App. Div. 377, 98 N. Y. Supp. 899; State v. Kelly, 54 Ohio St. 166, 43 N. E. 163; Bissman v. State, 9 Ohio Cir. Ct. Rep. 714; Myer v. State, 10 Ohio Cir. Ct. Rep. 226; Strong v. State, 2 Ohio N. P. 93, 3 Ohio Dec. 284; Commonwealth v. Huntley, 156 Mass. 236, 30 N. E. 1127, 15 L. R. A. 839; Cook v. State, 110 Ala. 40, 20 So. 360; Haines v. People, 7

Colo. App. 467, 43 Pac. 1047; State v. Peet, 80 Vt. 449, 68 Atl. 661, 130 Am. St. 998; People v. Luke, 122 N. Y. App. Div. 64, 106 N. Y. Supp. 621; St. Louis v. Bippen, 201 Mo. 528, 100 S. W. 1048; St. Louis v. Schottell (Mo.), 100 S. W. 1049; Birmingham v. Goldstein, 151 Ala. 473, 44 So. 113, 125 Am. St. 33; People v. Gilman (N. Y.), 103 N. Y. Supp. 954; Ex parte Byrd, 84 Ala. 17, 4 So. 397, 5 Am. St. 328; Commonwealth v. Schollenberger, 156 Pa. 201, 27 Atl. 30, 36 Am. St. 32, 22 L. R. A. 155; Ex parte Scott, 66 Fed. 45; Borden's Condensed Milk Co. v. Montclair (N. J. L.), 80 Atl. 30.

A wholesale grocer residing in the State and who is engaged in purchasing and selling goods in South Dakota and other States was held entitled to attack the validity of the South Dakota Pure Food Law. Jewett Bros. v. Smail, 20 S. D. 232, 105 N. W. 738. But see Bertram v. Commonwealth, 108 Va. 902, 62 S. E. 969.

The constitutionality of a pure food law is to be determined by its language and purpose, and not by the alleged wrongful institution of prosecutions under it by those charged with its enforcement against those guiltless of a violation of its provisions. Arbuckle v. Blackburn, 51 C. C. A. 122, 113 Fed. 616, 65 L. R. A. 864.

The Legislature may make it an offense to furnish oleomargarine to a guest without that guest's

adulterated milk or cream from the same, or of any imitation or adulterated butter or cheese, nor shall sell or offer for sale, or have in his, her or their possession, with intent to sell the same, as an article of food." Upon the trial of an accused for having violated this statute it was offered to show by a witness "that he saw manufactured the article sold; that it was made of pure animal fats; that the process of manufacture was clean and wholesome, the article containing the same elements as dairy butter, the only difference between them being that the adulterated article contained a smaller proportion of the fatty substance known as butterine; that this butterine existed in dairy butter in the proportion of from three to seven percent, and in the manufactured article in a smaller proportion, and was increased in the latter by the introduction of milk and cream; that this having been done, the article contained all the elements of butter produced from pure unadulterated milk or cream from the same except that the percentage of butterine was slightly smaller; that the only effect of butterine was to give flavor to the butter and that it had nothing to [do] with its wholesomeness; that the oleaginous substances in the manufactured article were substantially identical with those produced from milk or cream; and that the article sold to the prosecuting witness was a wholesome and nutritious article of food, in all respects as wholesome as butter produced from pure unadulterated milk or cream from unadulterated milk." This offer was rejected, and the action of the court was held correct.¹ From the affirmation of the Act a writ of error was taken to the Supreme Court of the United States, and it was there contended that the statute was void, because it deprived all coming within its provisions of rights

knowledge. *State v. Ball*, 70 N. H. 40, 46 Atl. 50, 57 L. R. A. 282; *State v. Collins*, 70 N. H. 218, 45 Atl. 1080.

A statute requiring food to be pure will not be declared void because it tends to create a monopoly of a certain kind of food. *Wright*

v. State, 88 Md. 705, 41 Atl. 795.

The State may prevent the sale of adulterated wine. *Ex parte Kohler*, 74 Cal. 38, 15 Pac. 436.

¹ *Powell v. Commonwealth*, 114 Pa. 265, 7 Atl. 913, 5 Cent. Rep. 890, 60 Am. Rep. 350.

of liberty and property, and denied to them the equal protection of the laws, rights which are secured by the Fourteenth Amendment to the Constitution of the United States. "It is scarcely necessary to say," said the court, "that if this statute is a legitimate exercise of the police power of the State for the protection of the health of the people, and for the prevention of fraud, it is not inconsistent with that amendment; for it is the settled doctrine of this court that, as government is organized for the purpose, among others, of preserving the public health and the public morals, it can not divest itself of the power to provide for those objects, and that the Fourteenth Amendment was not designed to interfere with the exercise of that power by the States." After denying that the statute was in contravention of this amendment, the court says: "Whether the manufacture of oleomargarine or imitation butter of the kind described in the statute is, or may be, conducted in such a way or with such skill and secrecy as to baffle ordinary inspection, or whether it involves such danger to the public health as to require, for the protection of the people, the entire suppression of the business, rather than its regulation in such manner as to permit the manufacture and sale of articles of that class that do not contain noxious ingredients, are questions of fact and of public policy which belong to the legislative department to determine. And as it does not appear upon the face of the statute, or from any facts of which the court must take judicial cognizance, that it infringes rights secured by the fundamental law, the legislative determination of those questions is conclusive upon courts. It is not a part of their function to conduct investigations of fact entering into questions of public policy merely, and to sustain or frustrate the legislative will, embodied in statutes, as they may happen to approve or disapprove the determination of such questions. The power which the Legislature has to promote the general welfare is very great, and the discretion which that department of the government has, in the employment of means to that end, is very large. While both the power and its discretion must be so exercised as not to impair the fundamental rights of life,

liberty and property, and while, according to the principles upon which our institutions rest 'the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails as being the essence of slavery itself.' yet in many cases of mere administration the responsibility is purely political, no appeal lying except to the ultimate tribunal of the public judgment, exercised either in the pressure of public opinion or by means of the suffrage.² The case before us belongs to the latter class. The Legislature, upon the fullest investigation, as one must conclusively presume, and upon reasonable grounds, as must be assumed from the record, has determined that the prohibition of the sale, or offering for sale, or having in possession to sell, for purposes of food, of any article manufactured out of oleaginous substances or compounds other than those produced from unadulterated milk or cream from unadulterated milk, to take the place of butter produced from unadulterated milk or cream from unadulterated milk, will promote the public health and prevent frauds in the sale of such articles. If all that can be said of this legislation is that it is unwise or unusually oppressive to those manufacturing or selling wholesome oleomargarine as an article of food, their appeal must be to the Legislature or to the ballot box, not to the judiciary. The latter can not interfere without usurping powers committed to another department of government."³

² Quoting from *Lick Co. v. Hopkins*, 118 U. S. 370, 6 Sup. Ct. Rep. 1064, 30 L. Ed. 226.

³ *Powell v. Commonwealth*, 127 U. S. 678, 8 Sup. Ct. 992, 32 L. Ed. 253, affirming 114 Pa. 265, 7 Atl. 913, 60 Am. Rep. 350, 5 Cent. Rep. 890; *McCray v. United States*, 195 U. S. 27, 24 Sup. Ct. 769, 49 L. Ed. 78; *Walker v. Pennsylvania*, 127 U. S. 699, 8 Sup. Ct. 997, 3 L. Ed. 261; *Commonwealth v. Waite*, 11 Allen 264, 87

Am. Dec. 711; *State v. Schlenker*, 112 Iowa 645, 84 N. W. 699, 84 Am. St. 360, 51 L. R. A. 347; *St. Louis v. Schuler*, 190 Mo. 524, 89 S. W. 621, 1 L. R. A. (N. S.) 928; *State v. Layton*, 160 Mo. 474, 61 S. W. 171, 62 L. R. A. 163; *State v. Sherod*, 80 Minn. 446, 83 N. W. 417, 50 L. R. A. 660, 81 Am. St. 268; *Stolz v. Thompson*, 44 Minn. 271, 46 N. W. 410; *Commonwealth v. Evans*, 132 Mass. 11.

"When a subject is within that

§ 5. Legislature's Determination that Certain Articles of Food are Detrimental to Health Not Conclusive.

Notwithstanding what has been said about the power of the Legislature to conclusively determine whether an article of food is detrimental to health of those using it, there is a dissent in high circles from the doctrine thus announced. This is particularly true in New York. In that State the manufacture and sale of the substance known as oleomargarine were prohibited. The statute was almost identical with that of Pennsylvania. The court construed the statute as a prohibition of the manufacture and sale of any article that could be used as a substitute for butter, however openly and fairly the character of the substance might be avowed and published, and to drive the substituted article from the market and protect those engaged in the manufacture of dairy products against the competition of cheaper substances capable of being applied to the same uses as articles of food. The

[the police] power, the extent to which it shall be exercised, and the regulations to effect the desired end, are generally wholly in the discretion of the Legislature." *State v. Smith*, 58 Minn. 35, 59 N. W. 545, 25 L. R. A. 759; *State v. Mrozinski*, 59 Minn. 465, 61 N. W. 560, 27 L. R. A. 76; *Helena v. Dwyer*, 64 Ark. 424, 42 S. W. 1071, 39 L. R. A. 266, 62 Am. St. 206; *Borden's Condensed Milk Co. v. Montclair* (N. J. L.), 80 Atl. 30. For cases on similar questions see *Jacobson v. Massachusetts*, 197 U. S. 11, 25 Sup. Ct. 358, 49 L. Ed. 643 (Vaccination); *Valentine v. Englewood*, 76 N. J. L. 509, 71 Atl. 344, 19 L. R. A. (N. S.) 262 (Scarlet fever); *Reduction Company v. Sanitary Works*, 199 U. S. 306, 26 Sup. Ct. 100, 50 L. Ed. 204 (destroying garbage); *Gardner v. Michigan*,

199 U. S. 325, 26 Sup. Ct. 106, 27 L. Ed. 1107 (destroying garbage); *Laurel Hill Cemetery Co. v. San Francisco*, 216 U. S. 358, 30 Sup. Ct. 501, 54 L. Ed. (burial within a city); *Atlantic City v. Abbott*, 73 N. J. L. 281, 62 Atl. 999.

An ordinance prohibiting the sale of domestic fowls which have been in cold storage prior to the removal of the entrails is a valid exercise of the police power, is enacted to promote the public health of the community, and merely regulates the use of property without destroying it. *People v. Reichter*, 128 N. Y. App. Div. 675, 112 N. Y. Supp. 936.

The Legislature can not establish a standard for food by which its adulteration is conclusively established. *People v. Cipperly*, 37 Hun 319.

ground was taken by the counsel of the accused that if such were the case, the manufacture or sale of any oleaginous compound, however pure and wholesome, as an article of food, if it was designed to take the place of dairy butter, was by the Act made a crime. To this the court said: "The result of the argument is that if, in the progress of science, a process is discovered of preparing beef tallow, lard, or any other oleaginous substance, and communicating to it a palpable flavor, so as to render it serviceable as a substitute for dairy butter, and equally nutritious and valuable, and the article can be produced at a comparatively small cost, which will place it within the reach of those who can not afford to buy dairy butter, the bar of this statute is upon it. Whoever engages in the business of manufacturing or selling the prohibited product is guilty of a crime; the industry must be suppressed; those who could make a livelihood by it are deprived of that privilege; the capital invested in the business must be sacrificed, and such of the people of the State as can not afford to buy dairy butter must eat their bread unbuttered." And after referring to the State Constitution, which provides that no member of the State shall be disfranchised, or be deprived of any of the rights and privileges secured by any of its citizens, unless by the law of the land or the judgment of his peers; and to the clause which declares that no person shall be deprived of life, liberty or property without due process of law; and to the first section of the Fourteenth Amendment of the Federal Constitution, the court said: "These constitutional safeguards have been so thoroughly discussed in recent cases that it would be superfluous to do more than refer to the conclusions which have been reached, bearing upon the question now under consideration. Among these, no proposition is now more firmly settled than that it is one of the fundamental rights and privileges of every American citizen to adopt and follow such lawful industrial pursuit, not injurious to the community, as he may see fit." And, referring to various decisions concerning the meaning of liberty, among which was one that the right to liberty embraces the right of man "to exercise his faculties and to

follow a lawful vocation for the support of life," the court said: "Who will have the temerity to say that these constitutional principles are not violated by an enactment which absolutely prohibits an important branch of industry for the sole reason that it competes with another, and may reduce the price of an article of food for the human race? Measures of this kind are dangerous even to their promoters. If the argument of the respondent in support of the absolute power of the Legislature to prohibit one branch of industry for the purpose of protecting another with which it competes, can be sustained, why could not the oleomargarine manufacturers, should they obtain sufficient power to influence or control the legislative councils, prohibit the manufacture or sale of dairy products? Would arguments then be found wanting to demonstrate the invalidity under the Constitution of such an Act? The principle is the same in both cases. The numbers engaged on each side of the controversy can not influence the question here. Equal rights to all are what are intended to be secured by the establishment of constitutional limits to legislative power and impartial tribunals to enforce them."¹

¹ *People v. Marx*, 99 N. Y. 386, 2 N. E. 29, 52 Am. Rep. 34, reversing 25 Hun 528, 3 N. Y. Cr. Rep. 11; *People v. Arenberg*, 105 N. Y. 123, 11 N. E. 277, 59 Am. Rep. 483.

In the case from which this quotation was made there was evidence introduced, and "it was proved on the part of the defendant by distinguished chemists that oleomargarine was composed of the same elements as dairy butter. That the only difference between them was that it contained a smaller proportion of fatty substance known as butterine. That this butterine exists in dairy butter only in small proportion—from three to six percent. That it ex-

ists in no other substance than butter made from milk, and it is introduced in oleomargarine butter by adding to oleomargarine stock some milk, cream or butter, and churning, and when this is done it has all the elements of natural butter, but there must always be a smaller percentage of butterine in the manufactured product than in the butter made from milk. The only effect of the butterine is to give flavor to the butter, having nothing to do with its wholesomeness. That the oleaginous substances in the oleomargarine are substantially identical with those produced from milk or cream. Professor Chandler testified that the only difference between the two

§ 6. Rule Followed by Courts in Determining Whether a Statute Forbidding the Sale of Food is Valid or Invalid.

The general rule is that the Legislature can not forbid the sale of wholesome food, but this statement must be examined with caution. The rule with respect to the sale of foods and their prohibition has been stated thus by the Supreme Court of Missouri: "When the courts have come to deal with such municipal regulations, they have announced the rule that, if the article is universally conceded to be so wholesome and innocuous that the court may take judicial notice of it, the Legislature under the Constitution has no right to absolutely prohibit it; but if there is a dispute as to the fact of its unwholesomeness for food or drink, then the Legislature can either regulate or prohibit it. The constitutionality of the law is not to be determined upon a question of fact in each case, but the courts determine for themselves, upon the fundamental principles of our Constitution, that the act of the Legislature or municipal assembly is not to be declared void unless the violation of the Constitution is so manifest as to leave no room for reasonable doubt."¹ "The constitutionality

articles was that dairy butter had more butterine. That oleomargarine contained not over one percent of that substance while dairy butter might contain four or five percent and that if four or five percent of butterine were added to the oleomargarine there would be no difference; it would be butter; irrespective of the source, they would be the same substances. According to the testimony of Professor Moore, whose statement was not controverted, oleomargarine, so far from being an article devised for purposes of deception in trade, was devised in 1872 or 1873 by an eminent French scientist, who had been employed by the French government to devise a substitute for

butter." (Extract from opinion in *People v. Marx*.)

¹ *St. Louis v. Liessing*, 190 Mo. 464, 89 S. W. 611, 109 Am. St. 774; *State v. Layton*, 160 Mo. 468, 61 S. W. 171, 62 L. R. A. 163, 83 Am. St. 487. See also *Adams v. Milwaukee*, 144 Wis. 371, 129 N. W. 518.

When there are conflicting scientific beliefs or theories on the question of danger of infection from bovine tuberculosis and of the efficacy of the tuberculin test, it is for the Legislature to determine upon which theory it will base its police regulations, and unless it is clearly and manifestly wrong the courts will not interfere. *Adams v. Milwaukee*, 144 Wis. 371, 129

of the law is not to be determined upon the question of fact in each case, but the courts determine for themselves upon the fundamental principles of our Constitution, which vests the legislative power in the general assembly, and the rule of construction adopted by our courts, 'that an Act of the Legislature is not to be declared void unless the violation of the Constitution is so manifest as to leave no room for reasonable doubt.' . . . Keeping in view this cardinal principle for our guidance, how can we say, in view of the contradictory evidence as to the effect on the health of bread made with alum baking powder, that the Legislature, beyond a reasonable doubt, transcended its constitutional right in prohibiting the use of alum in bread? We are not authorized to do so. . . . It may be that, in small quantities now used in those alum powders generally, it can not be shown that any particular person has ever lost his health from their use. But that the Legislature deemed their use deleterious can not be denied, and there is no conclusive evidence to the contrary as to justify this court in holding this Act, intended for the benefit of the public, is void. The mere wisdom or unwisdom of the Act is not for us to decide.''²

§ 7. Power to Define What Shall be Deemed an Adulteration.

The Legislature has the power to define what shall constitute an adulteration within the provisions of a statute forbidding the sale of the article of food or the drug in an adulterated condition.¹ But necessarily there must be a limitation

N. W. 518; *Borden's Condensed Milk Co. v. Montclair* (N. J. L.), 80 Atl. 30.

² *State v. Layton*, *supra*; *People v. Cipperly*, 101 N. Y. 634, 4 N. E. 107, 37 Hun 324; *State v. Schlenker*, 112 Iowa 642, 84 N. W. 698, 51 L. R. A. 347, 84 Am. St. 360.

¹ *State v. Weeden*, 17 Wyo. 418, 100 Pac. 114; *St. Louis v. Klaus-*

meier, 213 Mo. 119, 112 S. W. 516; *St. Louis v. Union Dairy Co.* 213 Mo. 148, 112 S. W. 525; *Crossman v. Lurman*, 192 U. S. 189, 24 Sup. Ct. 234, 48 L. Ed. 401, affirming 171 N. Y. 329, 63 N. E. 1097; *People v. Luke*, 122 N. Y. App. Div. 64, 106 N. Y. Supp. 621; *People v. Worden Grocery Co.*, 118 Mich. 604, 77 N. W. 315; *Commonwealth v.*

upon the power of the Legislature; for if it undertakes to declare a thing to be adulterated and unfit for food when it is not, and the court can declare that it is not an adulterated article from universal knowledge that it is not, then the statute will be held unconstitutional. For the Legislature can not forbid the sale of a food on the ground that it is unwholesome when universal knowledge of its properties shows that it is not. But if there be a doubt about the question, then the court can not substitute its opinion for that of the Legislature. In such an instance the opinion the opinion of the Legislature must be considered as right and binding.²

The courts, however, can not extend the definition of the Legislature so as to include things not falling within it.³ A statute, however, which provides that no person shall expose for sale any dairy products containing a preservative, other than certain kinds, and that no person shall induce any other person to violate its provisions, and that any person selling any preparation for use in violation of its provisions shall be guilty of the violation of the Act, is not a legislative determination that preservatives, other than those specified, are injurious to the public health, and unwholesome adulterations of dairy products, as it does not make the introduction of such foreign substance, however injurious, an adulteration, or such adulteration illegal, except where the substance is introduced for the purpose of preserving them. Consequently the provision is unconstitutional, because absolutely forbidding the sale of articles of food containing any preservatives other

Kevin, 202 Pa. 23, 51 Atl. 594, 90 Am. St. 613; *St. Louis v. Kruepeler* (Mo.), 139 S. W. 446.

² *Powell v. Commonwealth*, 114 Pa. 265, 7 Atl. 913, 5 Cent. Rep. 890, 60 Am. Rep. 350; affirmed 127 U. S. 678, 8 Sup. Ct. 1257, 32 L. Ed. 253; *Rigbers v. Atlanta*, 7 Ga. App. 411, 66 S. E. 991; *Adams v. Milwaukee*, 144 Wis. 371, 129 W. 518. See also *Borden's Condensed*

Milk Co. v. Montclair (N. J. L.), 80 Atl. 30; *McCrary v. United States*, 195 U. S. 27, 24 Sup. Ct. 769, 49 L. Ed. 78; *State v. Smith*, 58 Minn. 35, 59 N. W. 545, 25 L. R. A. 759; *Smith v. Alphin*, 150 N. C. 425, 64 S. E. 210.

³ *State v. Schlenker*, 112 Iowa 642, 84 N. W. 698, 51 L. R. A. 347, 84 Am. St. 360; *State v. Weeden*, 17 Wyo. 418, 100 Pac. 114.

than those excepted in the Act, though such food is not thereby rendered unwholesome.⁴ So where a statute of a State defined pure milk as a milk having 9.25 percent of solids, and a municipal ordinance defined it at 10.5 percent and made it an offense to sell milk with less than 10.5 percent solids, the ordinance was held invalid, because it made a sale of milk an offense which the statute permitted.⁵

So under the general welfare clause a municipality may prohibit the sale of ice cream which is adulterated, or contains any deleterious substance, or is otherwise impure or unwholesome; but it can not arbitrarily prescribe that ice cream containing less than a certain percent of butter fats shall not be sold at all, where the percentage is placed so high as to be unreasonable and exclude the sale of ice cream which is as wholesome as that of the prescribed percentage would be.⁶

But the Legislature may claim that an article shall be deemed adulterated if it be colored or coated or polished or powdered whereby damage is concealed, or is made to appear of greater value than it really is;⁷ and the courts have no power

⁴ *People v. Biesecker*, 169 N. Y. 53, 61 N. E. 990, 57 L. R. A. 178, 88 Am. St. 534, affirming 58 N. Y. App. Div. 391, 68 N. Y. Supp. 1067.

⁵ *St. Louis v. Klausmeier*, 213 Mo. 119, 112 S. W. 516; *St. Louis v. Union Dairy Co.*, 213 Mo. 525, 112 S. W. 525; *St. Louis v. Schulte (Mo.)*, 139 S. W. 449; *St. Louis v. Scheer (Mo.)*, 139 S. W. 434.

In these cases it was held that no prosecution whatever would lie against a person selling dairy products which came up to the standard fixed by the statutes; but, where he sold products below the standard, he would be liable to punishment under the State laws and not under the municipal ordinance, unless the standard of strength and purity fell also below the standard of the city ordinance, in which

event he would be liable to punishment under both the ordinance and the statute. An ordinance prescribing a lower standard is valid. *St. Louis v. Sheer (Mo.)*, 139 S. W. 434; *St. Louis v. Schulte (Mo.)*, 139 S. W. 449.

⁶ *Rigbers v. Atlanta*, 7 Ga. App. 411, 66 S. E. 991.

The Legislature may declare the use of sulphur in food is deleterious. *Smith v. Alphin*, 150 N. C. 425, 64 S. E. 210.

It is within the police power to prohibit the manufacture or sale of any article of food to which has been added a substance poisonous or injurious to health. *Commonwealth v. Kevin*, 202 Pa. 23, 51 Atl. 594, 90 Am. St. 613.

⁷ *Crossman v. Lurmon*, 171 N. Y. 329, 63 N. E. 1097; affirmed

to declare an Act void because an unreasonable and arbitrary test is prescribed by the statute, that being a matter exclusively for the Legislature.⁸ So a statute providing that an article of food shall be deemed adulterated "if it contains any added substance which is poisonous or injurious to health," makes it an adulteration to add a substance which is poisonous or injurious in any quantity, though the quantity added is not enough to make the compound poisonous or injurious to health.⁹

§ 8. Preventing Sale of Wholesome Food.

As elsewhere said, a State can not prevent the sale of wholesome food. "I imagine," said Justice Cullen of the New York Court of Appeals, "that the sale and consumption of a well-known article of food, or a product conclusively shown to be wholesome, could not be forbidden by the Legislature, even though it assumed to enact the law in the interest of public health. The limits of the police power must necessarily depend in many instances on the common knowledge of the times. An enactment of a standard of purity of an article of food, failing to comply with which the sale of the article is illegal, to be valid, must be within reasonable limits, and not of such a character as to practically prohibit the manufacture or sale of that which, as a matter of common knowledge, is good and wholesome."¹

192 U. S. 189, 24 Sup. Ct. 232, 48 L. Ed. 401; *State v. Armour Packing Co.*, 124 Iowa 323, 100 N. W. 59.

⁸ *People v. Worden Grocer Co.*, 118 Mich. 604, 77 N. W. 315; *Borden Condensed Milk Co. v. Montclair* (N. J. L.), 80 Atl. 30.

⁹ *Commonwealth v. Kevin*, 202 Pa. 23, 51 Atl. 594, 90 Am. St. 613.

"When the statute denounces adulterated milk without defining adulteration, the word may be allowed the meaning given it by lexicographers and understood by peo-

ple using the English language accurately." *St. Louis v. Jud* (Mo.), 139 S. W. 441; *St. Louis v. Scheer* (Mo.), 139 S. W. 434.

The Legislature or municipality may declare that the addition of water to milk is an adulteration. *St. Louis v. Ameln* (Mo.), 139 S. W. 429; *St. Louis v. Meyer* (Mo.), 139 S. W. 438.

¹ *People v. Biesecker*, 169 N. Y. 53, 61 N. E. 990, 57 L. R. A. 178, 88 Am. St. 534, affirming 58 N. Y. App. Div. 391, 68 N. Y. Supp. 1067.

It will be observed that Justice Cullen uses the words "conclusively shown" in determining whether the statute is unconstitutional. If it be not conclusively shown, or if it be not of common knowledge, that the food which it is forbidden to sell is not wholesome, then the statute will be held valid; for every statute is presumed constitutional until it clearly appears or it is clearly shown that it is not. The presumption is that the Legislature acted upon accurate information when it declared that certain food was unwholesome; and that presumption must be overcome with proof which conclusively shows that it is wholesome, or the court can say from common knowledge that it is not adulterated.²

Thus it has been held that while a municipality, under the general welfare clause, may prohibit the sale of ice cream which is adulterated, or contains any deleterious substance, or is otherwise impure or unwholesome, it can not arbitrarily prescribe that ice cream containing less than a certain percentage of butter fats shall not be sold at all, where the percentage is placed so high as to be unreasonable, or excluding the sale of ice cream which is as wholesome as that of the prescribed percentage would be.³

But care must here be taken between a sale of pure food in its natural condition and food that has been colored so as to deceive the purchaser. In the latter instance some of the cases hold that the latter may be excluded from the markets; but other cases hold that it cannot, although all of them admit that the Legislature may require it to be conspicuously labeled or branded so as to show its ingredients, and thus prevent the public being deceived.⁴

² *Isenhour v. State*, 157 Ind. 517, 62 N. E. 40, 87 Am. St. 228; *State v. Layton*, 160 Mo. 474, 61 S. W. 171, 62 L. R. A. 163. See also *Borden's Condensed Milk Co. v. Montclair* (N. J. L.), 80 Atl. 30.

"If it be conceded that the city council may prohibit the sale of any article of food, the wrongful use of which will or may injure the health of the consumer, then

they can prescribe what the citizens of the city shall eat by prohibiting the sale of all food. The Legislature or any of its creatures have no such power." *Helena v. Dwyer*, 64 Ark. 424, 42 S. W. 1071, 39 L. R. A. 266, 62 Am. St. 206.

³ *Rigbers v. Atlanta*, 7 Ga. App. 411, 66 S. E. 991.

⁴ *People v. Meyer*, 89 N. Y. App. Div. 185, 85 N. Y. Supp. 834.

§ 9. Preventing Deception in Food.

Not only has the Legislature the power to protect the health of the inhabitants of a State, but it may prevent deception in the sales of food. This is very forcibly illustrated in preventing the use of coloring matter in oleomargarine, where statutes have been universally upheld. "Assuming," said the Court of Appeals of New York, "as is claimed, that butter made from animal fat or oil is as wholesome, nutritious and suitable for food as dairy butter; that it is composed of the same elements and is substantially the same article, except as regards its origin, and that it is cheaper, and that it would be a violation of the constitutional rights and liberties of the people to prohibit them from manufacturing or dealing in it, for the mere purpose of protecting the producers of dairy butter against the competition, yet it can not be said that the producers of butter, made from animal fats, or oils, have any constitutional right to resort to drugs for the purpose of making their product resemble in appearance the more expensive article known as dairy butter, or that it is beyond the power of the Legislature to enact such laws as they may deem necessary to prevent the simulated article being put upon the market in such a form and manner as to be calculated to deceive. If it possesses," continued the court, "the merits which are claimed for it, and is innocuous, those making and dealing in it should be protected in the enjoyment of liberty in those respects, but they may legally be required to sell it for and as what it actually is and upon its own merits, and are not entitled to the benefit of any additional market value which may be imparted to it by resorting to artificial means to make it resemble dairy butter in appearance. It may be butter, but it is not butter from cream, and the difference in cost or market value, if no other, would make it a fraud to pass off one article for the other." Again: "The statutory prohibition is aimed at a designed

The Legislature may prevent the sale of artificially colored vinegar even though it be pure and labeled "colored." State v. Earl, 152 Mo. App. 235, 133 S. W. 402; St. Louis v. Polinsky, 190 Mo. 516, 89 S. A. 625.

and intentional imitation of dairy butter, in manufacturing the new product, and not at a resemblance in qualities inherent in the articles themselves and common to both." The court therefore held that artificial coloring of oleomargarine for the mere purpose of making it resemble dairy butter came within the statutory prohibition against imitation, and "that such prohibition is within the power of the Legislature, and acts upon the same principle which would sustain a prohibition of coloring winter dairy butter for the purpose of enhancing the market price by making it resemble summer dairy butter, should the Legislature deem such a prohibition necessary or expedient."¹ In Missouri a statute prohibits the manufacture and sale of oleaginous substances, or compounds of the same, in imitation of dairy products. In discussing the object of this statute the Supreme Court of that State said: "The central idea of the statute before us seems very manifest; it was, in our opinion, the prevention of facilities for selling or manufacturing a spurious article of butter, resembling the genuine article so closely in its external appearance as to render it easy to deceive purchasers in buying that which they would not buy but for the deception. The history of legislation on this subject, as well as the phraseology of the Act itself, very strongly tends to confirm this view. If this was the purpose of the enactment now under discussion, we discover nothing in its provisions which enables us, in the light of the authorities, to say that the Legislature, when passing the Act, exceeded the power confided to that department of government; and unless we can say this, we can not hold the Act to be anything less than valid."² In response to the suggestion that oleomargarine colored with annatto was a wholesome article of food, the sale of which could not be prohibited, the Supreme Court of New Jersey said: "If the sole basis of this statute were the protection of

¹ *People v. Arenberg*, 105 N. Y. 123, 11 N. E. 277, 59 Am. Rep. 483; *McAllister v. State*, 72 Md. 390; *People v. Simpson Crawford Co.*, 62 N. Y. Misc. 240, 114 N.

Y. Supp. 945; affirmed 142 N. Y. App. —, 126 N. Y. Supp. 1141.

² *State v. Addington*, 77 Mo. 110, affirming 12 Mo. App. 214.

the public health, this objection would be pertinent, and might require us to consider the delicate questions, whether and how far the judiciary can pass upon the adaptability of the means which the Legislature has proposed for the accomplishment of its legitimate ends. But, as already intimated, this provision is not aimed at the protection of the public health. Its object is to secure to dairymen and to the public at large a fuller and fairer enjoyment of their property, by excluding from the market a commodity prepared with a view to deceive those purchasing it. It is not intended that annatto has any other function in the manufacture of oleomargarine than to make it a counterfeit of butter, which is more generally esteemed and commands a higher price. That the Legislature may repress such counterfeits does not admit, I think, of substantial question. Laws of this character have of late years been frequently assailed before the courts, but always without success."³

* State v. Newton, 50 N. J. L. 534, 14 Atl. 634, 2 Inters. Com. Rep. 63; Pierce v. State, 63 Md. 596; State v. Myers, 42 W. Va. 822, 26 S. E. 539, 57 Am. St. 887, 35 L. R. A. 844; State v. Marshall, 64 N. H. 549, 15 Atl. 210, 1 L. R. A. 51; Powell v. Commonwealth, 114 Pa. 265, 7 Atl. 913, 60 Am. Rep. 350, 1 Pa. Co. Ct. Rep. 94; Butler v. Chambers, 36 Minn. 69, 30 N. W. 308, 1 Am. St. 38; State v. Horgan, 55 Minn. 183, 56 N. W. 88; Butler v. Chambers, 36 Minn. 69, 30 N. W. 308, 1 Am. St. 38; Plumley v. Massachusetts, 155 U. S. 461, 15 Sup. Ct. 154, 39 L. Ed. 223, affirming 156 Mass. 236, 30 N. E. 1127, 15 L. R. A. 839; People v. Girard, 145 N. Y. 105, 39 N. E. 823, 45 Am. St. 595; People v. Kilber, 106 N. Y. 321, 12 N. E. 795; Stolz v. Thompson, 44 Minn. 271, 46 N. W. 410; State v. Sherod, 80

Minn. 446, 83 N. W. 417, 50 L. R. A. 660, 81 Am. St. 268; State v. Layton, 160 Mo. 474, 61 S. W. 171, 62 L. R. A. 163, 83 Am. St. 487; State v. Capitol City Dairy Co., 62 Ohio St. 350, 57 N. E. 62, 57 L. R. A. 181; State v. Collins, 70 N. H. 218, 45 Atl. 1080; State v. Ball, 70 N. H. 40, 46 Atl. 50.

An ordinance forbidding the sale of milk containing coloring matter, a provision to prevent deception and unfair advantage over honest competitors, is valid. *St. Louis v. Polinsky*, 190 Mo. 516, 89 S. W. 625; *St. Louis v. Jud (Mo.)*, 139 S. W. 440.

A statute preventing the removal of cream, or any part thereof, from milk sold as pure milk to any factory in which milk is used as a material, is valid. *Mantel v. State*, 55 Tex. Cr. App. 456, 117 S. W. 855, 131 Am. St. 818; *Sue Lung v.*

§ 10. Preservatives in Food.

Notwithstanding the great power of the Legislature under the police power of the State, yet it has its limits. Under the guise of preventing the sale of pure food it may not prohibit the sale of food in which preservatives have been used to maintain its purity, if such preservative is harmless. Upon this question the New York Court of Appeals has made these observations:

"The preservation of food, and the arrest of its tendency to decay, is certainly a proper and lawful object in itself. It is a work in which man has been engaged, to some extent, from earliest history. It is the subject of large industries in this country, and the products of those industries are generally used by the community, and are lawful objects of manufacture and sale. The industry has grown to an enormous extent. These are matters of common knowledge. There is doubtless in the prosecution of these industries danger of adulteration, and of the use of processes injurious to public health. The regulation of these subjects for the protection of the public health, and the prevention of imposition on consumers, is within the power of the legislature, and the propriety of its exercise can not be questioned. But, while it may regulate, the Legislature may not destroy, the industry; and that is not a valid regulation, which, in dealing with the means of preserving food, makes the preservation of food itself an unlawful act. Ingredients and processes may be prohibited as unwholesome or causing deception, but not solely because they preserve."¹ But here the cases are not

State (Tex. Cr. App.), 117 S. W. 857.

Deception in sale of substances for butter may be forbidden. State v. Bockstruck, 136 Mo. 335, 38 S. W. 317; People v. Rotter, 131 Mich. 250, 91 N. W. 167, 9 Detroit Leg. N. 284; People v. Meyer, 89 N. Y. App. Div. 185, 85 N. Y. Supp. 834; People v. Simpson Crawford Co., 62 N. Y.

Misc. 240, 114 N. Y. Supp. 945, 142 N. Y. App. —, 126 N. Y. Supp. 1141.

A statute may require all vinegar to be sold without artificial coloring, even though the coloring be harmless and the bottle containing it be labeled "colored." State v. Earl, 152 Mo. App. 235, 133 S. W. 402.

¹ People v. Biesecker, 169 N. Y.

in harmony, for in Missouri it has been held that an ordinance prohibiting the sale of milk and cream containing a preservative was valid, even though one not injurious to health be used.²

§ 11. Pure Food Statutes Not Violations of the Fourteenth Amendment.

Pure food laws that apply to all persons alike are not in contravention of the Fourteenth Amendment. A claim that they are is untenable. Speaking of a Pennsylvania statute concerning the manufacture, sale and keeping of oleomargarine, the Supreme Court of the United States said: "The statute places under the same restrictions, and subjects to like penalties and burdens, all who manufacture, or sell, or offer to sell, or keep in possession to sell, the articles embraced by its prohibition; thus recognizing and preserving the principle of equality among those engaged in the same business." Earlier in the same opinion the court said: "It is scarcely necessary to say that this statute is a legitimate exercise of the police power of the State for the protection of the health of the people, and for the prevention of fraud. It is not inconsistent with the amendment; for it is the settled doctrine of this court that, as government is organized for the purpose, among others, of preserving the public health and the public morals, it can not divest itself of the power to provide for those objects; and that the Fourteenth Amendment was not designed to interfere with the exercise of that power by the States."¹

53, 61 N. E. 990, 88 Am. St. 534, 57 L. R. A. 178.

² St. Louis v. Schuler, 190 Mo. 524, 89 S. W. 621, 1 L. R. A. (N. S.) 928.

¹ Powell v. Commonwealth, 127 U. S. 678, 8 Sup. Ct. 1257, 32 L. Ed. 253, affirming 114 Pa. 265, 7 Atl. 913, 5 Cent. Rep. 890, 60 Am. Rep. 350; State v. Schlenker, 112 Iowa 642, 84 N. W. 698, 51 L. R.

A. 347; North American Cold Storage Co. v. Chicago, 211 U. S. 306, 29 Sup. Ct. 101, 53 L. Ed. —; Crossman v. Lurmon, 192 U. S. 189, 24 Sup. Ct. 234, 48 L. Ed. 401, affirming 171 N. Y. 329, 63 N. E. 1097, 98 Am. St. 599; Commonwealth v. McCann, 14 Pa. Super. Ct. 221; Walton v. Toledo, 23 Ohio Cir. Ct. Rep. 547; St. Louis v. Bippen, 201 Mo. 528, 100 S. W. 1048; State v. Tetu,

**§ 12. Intent, Statute Rendering Unnecessary to the
Commission of an Offense.**

It is competent for the Legislature to render an accused amenable to a statute forbidding the sale of adulterated articles, though he had no knowledge that the article he sold was adulterated at the time he made the sale. This is particularly true of milk. There is no doubt of the power of the legislators to enact such a statute. "It is notorious," said the New York Court of Appeals, "that the adulteration of food products has grown to proportions so enormous as to menace the health and safety of the people. Ingenuity keeps pace with greed, and the careless and heedless consumers are exposed to increasing perils. To redress such evils is a plain duty but a difficult task. Experience has taught the lesson that repressive measures which depend for their efficiency upon proof of the dealer's knowledge and intent to deceive and defraud are of little aid and rarely accomplish their purpose. Such an emergency may justify legislation which throws upon the seller the entire responsibility of the purity and soundness of what he sells and compels him to know and to be certain."¹

**§ 13. Statute Authorizing Board of Health to Adopt Rules
Regulating Standard of Foods and Defining Adulteration.**

The Legislature may authorize a Board of Health to adopt rules regulating minimum standards of foods, defining specific adulteration, declaring the methods of collecting and examining foods, and make a violation of these a penal offense. This is not a delegation of legislative power. The obvious purpose of such a statute is "to commit to a body

98 Minn. 351, 107 S. W. 953, 108 S. W. 470; *People v. Bowen*, 182 N. Y. 1, 74 N. E. 489, reversing 97 N. Y. App. Div. 642, 90 N. Y. Supp. 1106; *People v. West*, 106 N. Y. 293, 12 N. E. 610, 60 Am. Rep. 452, affirming 44 Hun 162; *State v. Foucade*, 45 La. Ann. 17, 13 So.

187, 40 Am. St. 249; *People v. Griffin* (N. Y.), 128 N. Y. Supp. 946.

¹ *People v. Kibler*, 106 N. Y. 321, 12 N. E. 795. See also *People v. Friedman*, 138 N. Y. App. Div. 29, 122 N. Y. Supp. 500; affirmed 200 N. Y. 591, 9 N. E. 1096.

of learned and scientific experts the duty of preparing such rules, and prescribing such tests as may from time to time, in the enforcement of the law, be found necessary in determining what combinations of substances are injurious to health, and to what extent, if at all, admixture, or deteriorations of foods and drugs, may go without injuriously affecting the health of the consumer. That which is required of the State Board of Health has no semblance to legislation. It merely relates to a procedure in the law's execution for a reliable and uniform ascertainment of the subjects upon which the law is intended to operate. Nor does the duty imposed upon the State board in any sense postpone the taking effect of the law until the duty is performed. Performance can never be said to be complete. The duty is continuing, and will aid at every time when a new food or drug is put forward. Besides, it is paradoxical to say that the law is not effective until the State board has acted, when it is certain that without the law they could not act at all. And to say their act puts the law in operation is to excuse them from acting, because no law requires it. This class of legislation emanates from an exercise of the police power of the State for the protection of the public health. The power of the Legislature, and the right to determine, for itself, when an emergency for such legislation exists, and the means and instrumentalities necessary to accomplish the end in view, is no longer a doubtful question. The peculiar character of the subject, embodying as it does considerations of sanitary science, is such as to require for just legal control something more than legislative wisdom, to designate accurately the subjects and instances intended to be affected. The description of these subjects, and the prescribing of rules by which they may be determined by a qualified agent is not legislation, but merely the exercise of administrative power. The law itself is complete and effective in all its parts. In respect to the matter to be determined by the State board of health in its execution, it awaits the performance of those duties. When performed, the law operates upon the things done by the board. While unperformed, the law remains ready to be ap-

plied whenever the preliminary conditions exist."¹ "In order to secure and promote the public health, the State creates boards of health as an instrumentality or agency for that purpose, and invests them with the power to adopt ordinances, by-laws, rules and regulations necessary to secure the objects of their organization. While it is true that the character or nature of such boards is administrative only, still the powers conferred upon them by the Legislature, in view of the great public interests confided to them, have always received from the courts a liberal construction, and the right of the Legislature to confer upon them power to make veritable rules, by-laws and regulations, is generally recognized by the authorities."² "That the Legislature," said the Court of Appeals of New York, "in its exercise of the constitutional authority may lawfully confer on boards of health the power to enact ordinances, having the force of law within the districts over which their jurisdiction extends, is not an open question. This power has been repeatedly recognized and affirmed."³ And ordinances designed to prevent the sale of adulterated milk are manifestly within the scope of sanitary regulations."⁴

§ 14. Artificially Colored Oleomargarine, Prohibiting Manufacture or Sale.

The manufacture of artificially colored oleomargarine may be prohibited by a free government without a violation of fundamental rights. There is such a distinction between ar-

¹ *Isenhour v. State*, 157 Ind. 517, 62 N. E. 40, 87 Am. St. 228.

² *Blue v. Beech*, 155 Ind. 121, 56 N. E. 89; *Bear v. Cedar Rapids*, 147 Ia. 341, 126 N. W. 324, 27 L. R. A. (N. S.) 1150.

³ Citing *Metropolitan Board v. Heister*, 37 N. Y. 661; *Health Department v. Knoll*, 70 N. Y. 530; *People v. The Justices*, 7 Hun 214,

⁴ *Polinsky v. People*, 73 N. Y. 65, affirming 11 Hun 390; *People v. Vandecar*, 175 N. Y. 440, 67 N. E.

913, 108 Am. St. 781, affirming 81 N. Y. App. Div. 128, 80 N. Y. Supp. 1108, and affirmed 199 U. S. 559, 50 L. Ed. 305, 26 Sup. Ct. 144.

A regulation of the health department, requiring milk peddlers to provide a special room for storing milk and cleansing utensils as a condition precedent to obtaining milk peddling license is a reasonable one. *People v. Owen* (N. Y.), 116 N. Y. Supp. 502.

tificially colored oleomargarine so as to cause it to look like butter and natural butter artificially colored, that the taxing of the former and not the latter can not be avoided as an arbitrary exertion of the taxing power of a State Legislature or of Congress without any basis of classification, taxing one article and excluding another of the same class.¹ If coloring matter may be used in oleomargarine so as to make it so closely resemble butter that the public will be deceived in purchasing it for butter, then it may be easily manufactured so as to be hurtful, and thus result in a fraud upon and injury to the public. Therefore, the inhibition of the use of coloring matter in oleomargarine is a reasonable police regulation tending to insure the public against fraud and injury. The purpose of the Legislature in permitting the use of harmless coloring matter in butter and in requiring that oleomargarine be sold in its natural state, is not for the purpose of discriminating in favor of butter, but to provide a ready means by which the public may know that an article offered for sale is butter and not oleomargarine.² "It can not in reason be said, as a matter of judicial inference, that such regulations for such purposes were a mere arbitrary interference with the rights of property, denying the equal protection of the laws, or that they amounted to a taking of property without due process of law."³

¹ *McCrary v. United States*, 195 U. S. 27, 24 Sup. Ct. 769, 49 L. Ed. 78.

² *State v. Capitol City Dairy Co.*, 62 Ohio St. 350, 57 N. E. 62, 57 L. R. A. 181, affirmed, *Capitol City Dairy Co. v. Ohio*, 183 U. S. 238, 22 Sup. Ct. 120, 46 L. Ed. 171; *People v. Simpson Crawford Co.*, 66 N. Y. Misc. 240, 114 N. Y. Supp. 945; affirmed 142 N. Y. App. —, 126 N. Y. Supp. 1141.

³ *Capitol City Dairy Co. v. Ohio*, 183 U. S. 238, 22 Sup. Ct. 120, 46 L. Ed. 171, affirming 62 Ohio St. 350, 57 L. R. A. 181, 57 N. E. 62; *Powell v. Pennsylvania*, 127 U. S.

678, 8 Sup. Ct. 992, 1257, 32 L. Ed. 253, affirming 114 Pa. 265, 60 Am. Rep. 350, 7 Atl. 913; *Schollenberger v. Pennsylvania*, 171 U. S. 1, 48 Sup. Ct. 757, 43 L. Ed. 49, reversing 170 Pa. 284, 30 L. R. A. 396, 33 Atl. 82, 5 Inter. Com. Rep. 506. 170 Pa. 296, 33 Atl. 85, *Plumley v. Massachusetts*, 155 U. S. 461, 15 Sup. Ct. 154, 32 L. Ed. 223, affirming 156 Mass. 236, 15 L. R. A. 839, 30 Atl. 1127; *Cook v. State*, 110 Ala. 40, 20 So. 360; *Palmer v. State*, 39 Ohio 236, 48 Am. Rep. 429; *In re Brosnahan*, 18 Fed. 62.

§ 15. Imitation of "Yellow Butter."

Whenever a statute prohibits the manufacture or sale of oleomargarine in imitation of "yellow butter," the question necessarily presents itself, "What is meant by the term yellow butter?" Does it mean all shades of yellow butter, or does it mean a particular shade or shades, or a technical color? These questions have been answered by a Wisconsin case. A statute forbade the sale or manufacture of any product, article or compound "made wholly out of any fat, oil or oleaginous substance or compound thereof, not produced from unadulterated milk or cream from the same, and without the admixture or addition of any fat foreign to said milk or cream, which shall be in imitation of yellow butter produced from such milk or cream with or without coloring matter." This section of this statute also provided that "nothing in this section shall be construed to prohibit the manufacture and sale of oleomargarine in a separate and distinct form and in such manner as will advise the consumer of its real character, and free from coloration or ingredient that cause it to look like butter." These words were held not to enlarge the previous provisions quoted in the text. It was held that not every shade of yellow in butter came within the protection of the Act forbidding the manufacture and sale of oleomargarine in imitation of "yellow butter," for the words in the statute were used in their popular rather than in any trade or technical sense. "The words 'yellow butter' require no definition to explain their meaning. They are used in the statute in the popular rather than in any trade or technical sense. They define themselves. And, first of all, it must be obvious that yellow butter doesn't mean all kinds of butter. Yet the trial court instructed the jury as follows: 'Butter—that is, natural butter, as is shown by the undisputed testimony in this case, and as is a matter of common knowledge,—varies in the degree of yellow from light straw color in winter to rich light orange yellow in the summer. Colored butter varies from a shade of yellow somewhat more pronounced than the natural color of winter but-

ter to shades higher than the highest natural color of summer butter, and all these shades of yellow butter come within the protection of this law; and it is equally forbidden to sell oleomargarine in imitation of the lightest shade of yellow butter, colored or uncolored, as it is of the most pronounced or intermediate shade.' Here the jury are informed that natural butter as a matter of common knowledge varies between certain shades of yellow. This must have been understood by the jury to mean all natural butter. This is the ordinary and natural import of the language. It may be that there is no purely white butter, and that placed alongside of white paint the whitest butter would show a yellow tinge, and it may be that light straw color approximates white but never reaches it. But, after assuming this to be true, and after having thus described butter generally, where the court charged the jury that it was forbidden to sell oleomargarine in imitation of the lightest shade of yellow butter, colored or uncolored, as much as it was forbidden to sell it in imitation of the most pronounced or intermediate shades, it added to the statute something not found therein, and it laid down a rule of law which, if followed by this court, would go far to convict the lawmakers of having under pretense of making a police regulation to prevent fraud, enacted a law to exclude all competition of oleomargarine with all kinds of butter. This was error.'¹

¹State v. Meyer, 135 Wis. 86, 114 N. W. 501, 14 L. R. A. (N. S.) 1061.

In this case the court also held that a witness could not be asked how a sample of oleomargarine compared in color with the color of butter manufactured for certain markets, for the purpose of showing that it resembled yellow butter.

"Is the article," asked the court, "in question an article, product or compound made wholly or partially out of any fat, oil or oleomar-

garine substance not the product of milk or cream, and which is an imitation of yellow butter? It does not tend to establish the affirmation of this simple issue of fact, but rather to confuse it when other evidence is offered to show how the article in question compares in color with the color of butter that is manufactured in this part of the State for markets in Chicago, Elgin and New York. The article is to be compared with yellow butter by direct testimony of any person who is able to testify

§ 16. Discrimination Between Colored Butter and Colored Oleomargarine.

A statute which permits pure butter to be colored so as to give the impression that it is butter of an excellent color, or, in other words, does not prohibit the coloring of butter

on the subject, and that will include all ordinary witnesses except those who show affirmatively their lack of knowledge or some degree of color blindness. These reasons exclude any evidence in regard to whether or not the article in question would pass, as far as color is concerned, for the markets in Elgin, Chicago, Milwaukee and New York, or any other market. Such evidence tends to lead the jury away from the true point of inquiry, and, having received the sanction of the court for his ruling admitting it, and thereafter in his charge to the jury, must be deemed to have had a prejudicial effect. The jury was thus led to compare the article or compound in question, not with the terms of the statute, but with some rule or criterion not found in the statute. It would be adding to the statute to construe it as prohibiting the sale of a compound in imitation of yellow butter, or in imitation of some shade of yellow butter which meets the demands of the market, or the standard of the operators at Elgin or elsewhere, if such shade or standard was not in fact yellow butter within the plain and popular meaning of these terms. If such standard was yellow butter within the ordinary and popular meaning of these terms, then the evidence was immaterial." State

v. Meyer, 135 Wis. 86, 114 N. Y. 501, 14 L. R. A. (N. S.) 1061.

See also *McCann v. Commonwealth*, 198 Pa. 509, 48 Atl. 470, 14 Super. Ct. Rep. 221; *Beha v. State*, 67 Neb. 637, 93 N. W. 155; *State v. Armour Packing Co.*, 124 Ia. 323, 100 N. W. 59; *Commonwealth v. Caulfield*, 211 Pa. 644, 61 Atl. 243; *State v. Ball*, 70 N. H. 40, 46 Atl. 50; *In re Powell*, 10 N. J. L. Jour. 25; *State v. Collins*, 70 N. H. 218, 45 Atl. 1080; *People v. Rotter*, 131 Mich. 250, 91 N. W. 167, 9 Det. Leg. N. 284; *State v. Hammond Packing Co.*, 105 Minn. 359, 117 N. W. 606; *State v. Rogers*, 95 Me. 94, 49 Atl. 564; *Commonwealth v. Huntley*, 156 Mass. 236, 30 N. E. 1127; *Cook v. State*, 110 Ala. 40, 20 So. 360; *Wright v. State*, 88 Md. 705, 41 Atl. 795; *State v. Bockstruck*, 136 Mo. 335, 38 S. W. 317; *Capitol City Dairy Co. v. Ohio*, 183 U. S. 238, 22 Sup. Ct. 120, 46 L. Ed. 171, affirming 62 Ohio St. 350, 57 L. R. A. 181, 57 N. E. 62.

The Legislature may prohibit the sale of imitation butter irrespective of the vendor's actual knowledge of the character of the product which he sells. *People v. Meyer*, 44 N. Y. App. Div. 1, 60 N. Y. Supp. 415; *People v. Griffin*, 128 N. Y. Supp. 946. On the general proposition see *Commonwealth v. Diefenbacher*, 14 Pa.

in that way, but does prohibit the coloring of oleomargarine in imitation of butter is not void because it discriminates between the two articles. "But it is urged," said the Supreme Court of the United States, "that artificially colored oleomargarine and artificially colored natural butter are in substance and in effect one and the same thing, and from this it is deduced that to lay an excise tax only on oleomargarine artificially colored and not on butter so colored is violative of the due process clause of the Fifth Amendment, because, as there is no possible distinction between the two, the Act of Congress was a mere arbitrary imposition of an exaction on the one article and not on the other, although essentially of the same class." Conceding for the argument that this amendment applied to an instance of this kind, the court continued: "The distinction between natural butter artificially

Super. Ct. 264; *Holtgreive v. State*, 7 Ohio N. P. 389, 5 Ohio S. & C. P. 166; *Commonwealth v. Seiler*, 20 Pa. Super. Ct. 260 (renovated butter); *People v. Freeman*, 242 Ill. 373, 90 N. E. 366; *Commonwealth v. McDermott*, 224 Pa. 362, 73 Atl. 427; *People v. Hale*, 62 N. Y. Misc. Rep. 240, 114 N. Y. Supp. 914; affirmed *People v. Fried*, 133 N. Y. App. Div. 889, 118 N. Y. Supp. 1131; *Commonwealth v. McDermott*, 37 Pa. Super. Ct. 1; *Groff v. State*, 171 Ind. 547, 85 N. E. 769; *Commonwealth v. Paul*, 148 Pa. 559, 24 Atl. 78; *People v. Ciperly*, 101 N. Y. 634, 4 N. E. 107, reversing 37 Hun 319; *People v. Eddy*, 59 Hun 615, 12 N. Y. Supp. 628; *State v. Campbell*, 64 N. H. 402, 13 Atl. 585; *Weideman v. State*, 55 Minn. 183, 56 N. W. 688; *State v. Aslesen*, 50 Minn. 5, 52 N. W. 220, 36 Am. St. 620; *Butler v. Chambers*, 36 Minn. 69, 30 N. W. 308; *Commonwealth v. Evans*, 132 Mass. 11; *McAllister v.*

State, 72 Md. 390, 20 Atl. 143; *Pierce v. State*, 62 Md. 592; *State v. Snow*, 81 Iowa 642, 47 N. W. 777, 11 L. R. A. 355; *Powell v. Pennsylvania*, 127 U.S. 678, 8 Sup. Ct. 992, 1257, 32 L. Ed. 253, affirming 114 Pa. 265, 7 Atl. 913, 60 Am. Rep. 350; *Walker v. Pennsylvania*, 127 U. S. 699, 8 Sup. Ct. 997, 32 L. Ed. 261; *In re Brosnahan*, 18 Fed. 62; *State v. Capitol City Dairy Co.*, 62 Ohio St. 350, 57 N. E. 62, 57 L. R. A. 181; *Beha v. State*, 67 Neb. 27, 93 N. W. 155; *Jewett Bros. v. Smail*, 20 S. D. 175, 105 N. W. 738; *State v. Addington*, 12 Mo. App. 214; affirmed 77 Mo. 110; *Butler v. Chambers*, 36 Minn. 69, 30 N. W. 308; *People v. Simpson Crawford Co.*, 62 N. Y. Misc. 240, 114 N. Y. Supp. 945; affirmed 142 N. Y. App. —, 126 N. Y. Supp. 1141.

See remarks of Dr. Wiley upon the effect of coloring butter. *Wiley, Foods and Their Adulteration*, 185.

colored and oleomargarine artificially colored so as to cause it to look like butter, has been pointed out in previous adjudications of this court.¹ Indeed, in the case referred to, the distinction between the two products was held to be so marked, and the aptitude of the oleomargarine when artificially colored, to deceive the public into believing it to be butter, was decided to be so great that it was held no violation of the due process clause of the Fourteenth Amendment was occasioned by State legislation absolutely forbidding the manufacture, within the State, of oleomargarine artificially colored. As it has been thus decided that the distinction between the two products is so great as to justify that statute prohibitive of the manufacture of oleomargarine artificially colored, there is no foundation for the proposition that the difference between the two was not sufficient under the extremest view, to justify a classification, distinguishing between them."² Many of the State courts have also decided the same question in the same way. Thus in New Hampshire it was said by the Supreme Court of that State: "Butter is a necessary article of food, of almost universal consumption; and if an article compounded from cheaper ingredients, which many people would not purchase or use if they knew what it was, can be made so closely to resemble butter that ordinary persons can not distinguish it from genuine butter, the liability to deception is such that the protection of the public requires those dealing in the article in some way to designate its real character. . . . The prohibition of the statute being directed against imposition in selling or exposing for sale artificial compounds resembling butter in appearance and flavor, and liable to be mistaken for genuine butter, it is no defense that the article sold or exposed for sale is free

¹ *Capitol City Dairy Co. v. Ohio*, 183 U. S. 238, 22 Sup. Ct. 120, 46 L. Ed. 171, affirming 62 Ohio St. 350, 57 N. E. 62, 57 L. R. A. 181; *State v. Meyer*, 134 Wis. 156, 114 N. W. 501, 14 L. R. A. (N. S.) 1061 note; *People v. Hinshaw*, 135

Mich. 378, 97 N. W. 758, 10 Det. L. N. 794.

² *McCrary v. United States*, 195 U. S. 27, 24 Sup. Ct. 769, 49 L. Ed. 78; *Capitol City Dairy Co. v. Ohio*, 183 U. S. 238, 22 Sup. Ct. 120, 46 L. Ed. 171, affirming 62 Ohio St. 350, 57 L. R. A. 181, 57 N. E. 62.

from impurities and unwholesome ingredients, and healthy and nutritious as an article of food.”³

§ 17. Requiring Oleomargarine to be Colored an Unnatural Color.

In order to prevent deception in the sale of oleomargarine for butter, in some States the Legislatures have enacted statutes requiring the former to be colored pink. It is hardly necessary to say that statutes of this character have not stood the test. “In a case like this,” said the Supreme Court of the United States, “it is entirely plain that if the State has not the power to absolutely prohibit the sale of an article of commerce like oleomargarine in the pure state, it has no power to provide that such article shall be colored, or rather discolored, by adding a foreign substance to it in the manner described in the statute. Pink is not the color of oleomargarine in its natural state. The Act necessitates and provides for adulteration. It enforces upon the importer the necessity of adding a foreign substance to his article, which is thereby rendered unsalable, in order that he may be permitted to lawfully sell it. If enforced, the result could be foretold. To color the substance as provided for in the statute naturally excites a prejudice and strengthens a repugnance up to the point of positive and absolute refusal to purchase the article at any price. The direct and necessary result of a statute must be taken into consideration when deciding as to its validity, even if the result is not in so many words either enacted or distinctly provided for. In whatever language a

³ State v. Marshall, 64 N. H. 549, 15 Atl. 210, 1 L. R. A. 151; People v. Arenburg, 105 N. Y. 123, 11 N. E. 277, 59 Am. Rep. 483; Commonwealth v. Huntley, 156 Mass. 236, 30 N. E. 1127, 15 L. R. A. 839; State v. Addington, 77 Mo. 110, affirming 12 Mo. App. 214; Waterbury v. Newton, 50 N. J. L. 534, 14 Atl. 604; In re Powell, 10

N. J. Law Jour. 25; Powell v. Commonwealth, 114 Pa. 265, 7 Atl. 913, 60 Am. Rep. 350; affirmed 127 U. S. 678, 8 Sup. Ct. 992, 1257, 32 L. Ed. 253; Butler v. Chambers, 36 Minn. 69, 30 N. W. 308; State v. Horan, 55 Minn. 183, 56 N. W. 688; McAlister v. State, 72 Md. 390, 20 Atl. 143.

statute may be framed, its purpose must be determined by its natural and reasonable effect.¹ Although under the wording of this statute the importer is permitted to sell oleomargarine freely and to any extent, provided he colors it pink, yet the permission to sell, when accompanied by the imposition of a condition which, if complied with, will effectually prevent any sale, amounts in law to a prohibition. If this provision for coloring the article were a legal condition, a Legislature could not be limited to pink in the choice of colors. The legislative fancy or taste would be boundless. It might equally as well provide that it should be colored blue or red or black. Nor do we see that it would be limited to the use of coloring matter. It might, instead of that, provide that the article should only be sold if mixed with some other article, which, while not deleterious to health, would, nevertheless, give out some offensive smell. If the Legislature have the power to direct that the article shall be colored pink, which can only be accomplished by the use of some foreign substance that will have that effect, we do not know upon what principle it should be confined to discoloration, or why a provision for an offensive odor could not be just as valid as one prescribing the particular color. The truth is, however, as we have above stated, the statute in its necessary effect is prohibitory, and therefore upon the principle recognized in the Pennsylvania cases it is invalid."²

¹ Citing *Henderson v. Mayor*, 92 U. S. 259, 23 L. Ed. 543; *Morgan's Steamship Co. v. Louisiana*, 118 U. S. 455, 6 Sup. Ct. 1114, 30 L. Ed. 237, affirming 36 La. Ann. 666.

² *Collins v. New Hampshire*, 171 U. S. 30, Sup. Ct. 768, 43 L. Ed. —. The Pennsylvania case alluded to is *Schollenberger v. Pennsylvania*, 171 U. S. 1, 18 Sup. Ct. 757, 43 L. Ed. 49; *State v. Bruce*, 55 W. Va. 384, 47 S. E. 146.

Before the decision of the Supreme Court of the United States, the Supreme Court of New Hampshire had decided such a statute to be valid. *State v. Marshall*, 64 N. H. 549, 1 L. R. A. 51, 15 Atl. 210.

So also a Federal court. *Armour Packing Co. v. Snyder*, 84 Fed. 136, and the Supreme Court of West Virginia. *State v. Meyers*, 42 W. Va. 822, 26 S. E. 539, 35 L. R. A. 844, 57 Am. Rep. 887.

§ 18. Preventing Deception in Imported Oleomargarine.

While a State can not prevent the importation of oleomargarine, yet it may regulate its sale after it is imported, and if it is calculated to deceive the public may prevent its sale in that condition. A statute of Massachusetts prohibited the rendering or manufacturing, selling, offering for sale, exposing for sale or having in possession with intent to sell, any article, product or compound made wholly or partly out of any fat, oil or oleaginous substance or compound thereof, not produced from unadulterated milk or cream from the same, "which shall be in imitation of yellow butter produced from pure unadulterated milk or cream of the same." But a proviso provided that nothing in the Act should "be construed to prohibit the manufacture or sale of oleomargarine in a separate and distinct form, and in such a manner as will advise the consumer of its real character, free from coloration or ingredient that causes it to look like butter." Oleomargarine was shipped from Illinois into that State. It was a ten-pound package, manufactured from pure animal fats or substances and designed to take the place of butter produced from pure unadulterated milk or cream. It was a wholesome, nutritious food, and a palatable article of food, and was in no way deleterious to the public health or welfare. It was claimed that this statute was void, because it was a regulation of commerce among the States; that it violated that clause of the Constitution declaring that the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States; that it also violated that clause providing that no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws, and that property shall not be taken for public purposes; and that also it contravened the Federal Act of 1886¹ defining butter and imposing a tax upon and regulating the manu-

¹ 24 U. S. Stat. at Large 209; Rev. Stat. Supp. 2d Ed. 505.

facture, sale, importation and exportation of oleomargarine. From an affirmation by the Supreme Court of Massachusetts of the judgment of conviction,² an appeal was taken to the Supreme Court of the United States, where the Supreme Court of Massachusetts was sustained. The court, after holding that the Federal statute concerning oleomargarine did not control the question at issue, said, first analyzing the Massachusetts statute:

"It will be observed that the statute of Massachusetts, which is alleged to be repugnant to the commerce clause of the Constitution, does not prohibit the manufacture or sale of all oleomargarine, but only such as is colored in imitation of yellow butter produced from pure unadulterated milk or cream of such milk. If free from coloration or ingredient that 'causes it to look like butter,' the right to sell it 'in a separate and distinct form, and in such manner as will advise the consumer of its real character,' is neither restricted nor prohibited. It appears, in this case, that oleomargarine, in its natural condition, is of 'a light-yellowish color,' and that the article sold by the accused was artificially colored 'in imitation of yellow butter.' Now, the real object of coloring oleomargarine, so as to make it look like genuine butter, is that it may appear to be what it is not, and thus induce unwary purchasers, who do not closely scrutinize the label upon the package in which it is contained, to buy it as and for butter produced from unadulterated milk or cream from such milk. The suggestion that oleomargarine is artificially colored so as to render it more palatable and attractive can only mean that customers are deluded, by such coloration, into believing that they are getting genuine butter. If any one thinks that oleomargarine, not artificially colored so as to cause it to look like butter, is as palatable or as wholesome for purposes of food as pure butter, he is, as already observed, at liberty under the statute of Massachusetts to manufacture it in that State, or to sell it there in such manner as to inform the customer of its real character. He is only forbidden to practice, in such matters, a fraud upon

² *Plumley's case*, 156 Mass. 236, 30 N. E. 1127, 15 L. R. A. 839.

the general public. The statute seeks to suppress false pretenses and to promote fair dealing in the sale of an article of food. It compels the sale of oleomargarine for what it really is, by preventing its sale for what it is not. Can it be that the Constitution of the United States secures to any one the privilege of manufacturing and selling an article of food in such manner as to induce the mass of people to believe that they are buying something which, in fact, is wholly different from that which is offered for sale? Does the freedom of commerce among the States demand a recognition of the right to practice a deception upon the public in the sale of any articles, even those that may have become the subject of trade in different parts of the country?"³

§ 19. Bond Required of Butter and Cheese Makers to Protect their Patrons.

In Illinois a statute required of all operators of butter and cheese factories on the operative plan to give bonds to protect their patrons. This was held to be a valid exercise of police power. "It is said this is not a police regulation," said the court. "That may be true if the terms were confined merely to the protection of the health and morals of the people. The term has much more comprehensive meaning. It has been defined to be 'the regulation and government of a country or city, so far as regards its inhabitants;' also, 'the laws, ordinances, and other measures which require the citizens to exercise their rights in a particular form.' It is true there are other and more limited meanings of the word, and when it is said that there are other limits to its exercise than the Constitution, it has reference to the more restricted meaning of the term. When exercised by the Legislature in its more comprehensive sense, in the passage of laws for the protection of life, liberty and property, or laws for the general welfare, the only limitations to restrain its action must

³ *Plumley v. Massachusetts*, 155 U. S. 461, 15 Sup. Ct. 154, 39 L. Ed. 223, affirming 156 Mass. 236, 30 N. E. 1127, 15 L. R. A. 839;

McCann v. Commonwealth, 198 Pa. 509, 48 Atl. 470. See also *Borden's Condensed Milk Co. v. Montclair* (N. J. L.), 80 Atl. 30.

be found in the Constitution. This, in the larger sense, is an exercise of the police power by the General Assembly, and falls fully within legislative power, and sustains the enactment under consideration." It was also held that the statute was not special legislation. "It embraces all persons in the State similarly engaged," said the court. "If all laws were held unconstitutional because they did not embrace all persons, few would stand the test. . . . A law is general, not because it embraces all of the governed, but that it may, from its terms, when many are embraced in its provisions, and all others may be when they occupy the position of those who are embraced."¹

**§ 20. Furnishing Oleomargarine at U. S. Soldiers' Homes—
Application of State Statute.**

A statute of Ohio required every proprietor, keeper, manager or person in charge of any hotel, boarding house, restaurant, eating house, lunch counter or lunch room who therein served, used or furnished any oleomargarine, to display and keep a white placard in a conspicuous place, where it might be easily seen and read, in the dining room, eating house, restaurant, lunch room or place where it is used, furnished, served, sold, or disposed of, which placard had to have on it in large letters, "Oleomargarine Sold and Used Here." If this placard was not so displayed, the proprietor was liable to a fine. The Governor of the Central Branch of the National Home for Disabled Volunteer Soldiers, located at Dayton, Ohio, was in charge of the eating house at that Branch; and he served to the inmates of the Home their daily food or rations in the mess room of the Home. Oleomargarine was a part of this food. He displayed no placard announcing that he served that product; and because of this omission he was indicted for having violated this Ohio statute. On appeal to the Supreme Court of the United States, it was held that he was not amenable to the State statute; that in making provision for feeding the inmates of the

¹ *Hawthorn v. People*, 109 Ill. 302, 50 Am. Rep. 610.

Home, under the direction of the managers and approval of Congress, he was engaged in the internal administration of a Federal institution, and the State Legislature had no constitutional power to interfere with the management provided by Congress.¹

§ 21. Compounding Articles of Wholesome Food, State Prohibiting—Labeling.

A state can not prohibit the sale of compound articles of wholesome food. Nor can it, it has been said (though in a very doubtful assertion, and not in harmony with the greater number of authorities), require such a food to be so labeled as to show the constituent parts. So it has been held that a statute on this subject should name the particular article of food, the adulterating which is prohibited by the Legislature, and which is required to be labeled. A statute which simply embraced articles of food or drink without naming any, and makes the mixture of any articles of food, however nutritious, without labeling the product, an offense, has been said to be too broad. "We hold that an Act on this subject, to be enforced, should name the particular article of food, the adulteration of which is prohibited by the Legislature, and which is required to be labeled. In all cases on this subject which have come to our notice, the Legislature appears to have directed the law to some particular article of food or drink. Now, as bearing on the subject before us, we hold that it would be entirely competent for the Legislature, by an Act, to prohibit the sale, etc., of flour mixed with meal, or any other wholesome article, without properly labeling the product of such combination. They have not done this. The prosecution is attempted to be maintained under the general Act to prohibit the intermixing of all foods. We do not believe that it was competent for Legislature to do this."¹

¹ Ohio v. Thomas, 173 U. S. 276, 19 Sup. Ct 453, 43 L. Ed. 699, affirming 87 Fed. 453, 31 C. C. A. 80 and 58 U. S. App. 431, affirming 82 Fed. 304.

¹ Dorsey v. State, 38 Tex. Crim.

App. 527, 44 S. W. 514, 40 L. R. A. 201.

Water is wholesome and so is milk, but the Legislature may prohibit their combination and sale.

State v. Schlenker, 112 Iowa

§ 22. Renovated Butter.

The State may require all renovated butter to be distinctly labeled as such;¹ and where a statute requires it to be labeled, it is not a sufficient compliance with the statute for the vendor to orally inform the purchaser when making the purchase that it is renovated butter.²

§ 23. Federal Oleomargarine Statute of 1886.

The Federal Statute of 1886¹ and the amended Act of 1902,² imposing a tax upon oleomargarine, and regulating its manufacture and sale, are constitutional. Congress possessed the power to impose the tax it did in that statute and to discriminate between oleomargarine colored to resemble butter and butter colored so as to resemble butter of a higher grade than it was in fact.³

§ 24. Federal Statute on Oleomargarine Prohibiting State Regulation of its Manufacture and Sale.

The Federal statute¹ of 1886 on the subject of oleomargarine, 42, 84 N. W. 698, 51 L. R. A. 347, 84 Am. St. 360; *Commonwealth v. Waite*, 11 Allen 264, 87 Am. Dec. 711; *St. Louis v. Ameln* (Mo.), 139 S. W. 429; *St. Louis v. Sheer* (Mo.), 139 S. W. 434; *St. Louis v. Kruempeler* (Mo.), 139 S. W. 446.

That a State can not prevent the compounding of a number of wholesome articles of food and their sale as an article of food, see *Powell v. Commonwealth*, 114 Pa. 265, 60 Am. Rep. 350; *State v. Newton*, 50 N. J. L. 254, 2 Inter. Com. Rep. 63; *Palmer v. State*, 39 Ohio St. 236, 48 Am. Rep. 429.

¹ *Commonwealth v. Seiler*, 20 Pa. Super. Ct. 260.

² *People v. Waters*, 114 N. Y. App. Div. 669, 100 N. Y. Supp. 177.

¹ U. S. Stat. at Large 209. See Appendix.

² 32 U. S. Stat. at Large 93. See Appendix.

³ *McCrary v. United States*, 195 U. S. 27, 24 Sup. Ct. 769, 49 L. Ed. 78; *Schick v. United States*, 195 U. S. 65, 24 Sup. Ct. 826, 49 L. Ed. 99; *United States v. Dougherty*, 101 Fed. 439.

The motives of Congress in imposing a tax on artificially colored oleomargarine are not open to judicial inquiry in considering the power of that body to enact such legislation. *McCrary v. United States*, *supra*.

¹ 24 U. S. Stat. at Large 209; Rev. Stat. Supp. 2d Ed. 505. See Appendix.

ine does not prohibit a State enacting a law so regulating its sale as to prevent the public being deceived. It does not prevent a State requiring oleomargarine to be sold in a separate and distinct form, and in such a manner as will advise the consumer of its real character, free from coloration or ingredient that cause it to look like genuine butter. It may be conceded that Congress in the Act of 1886 has legislated fully on the subject of oleomargarine "so far as the purpose of that Act is concerned. But there is no ground to suppose," said the Supreme Court of the United States, "that Congress intended in that enactment to interfere with the exercise by the State of any authority they could rightfully exercise over the sale within their respective limits of the article defined as oleomargarine. The statute imposed certain special taxes upon manufacturers of oleomargarine, as well as upon the wholesale and retail dealers in that compound." After calling attention that the Act adopts certain prior sections in point of time of the Revised Statutes, where it is provided that the payment of an internal revenue tax "shall not be held to exempt any person from penalty or punishment provided by the laws of any State for carrying on the same within such State, or in any manner to authorize the commencement or continuance of such trade or business contrary to the laws of such State or in places prohibited by municipal law;" and the payment of the tax shall not "be held to prohibit any State from placing a duty or tax on the same trade or business, for State or other purposes," the court said: "It is manifest that this section was incorporated into the Act of August 2, 1886, to make it clear that Congress had no purpose to restrict the power of the States over the subject of the manufacture and sale of oleomargarine within their respective limits. The taxes prescribed by that Act were imposed for national purposes, and their imposition did not give authority to those who paid them to engage in the manufacture or sale of oleomargarine in any State which lawfully forbade such manufacture or sale, or to disregard any regulations which a State might lawfully prescribe in reference to that article. Nor was the Act of Congress re-

lating to oleomargarine intended as a regulation of commerce among the States. Its provisions do not have special application to the transfer of oleomargarine from one State of the Union to another. They relieve the manufacturer or seller, if he conforms to the regulations prescribed by Congress or by the Commissioner of Internal Revenue under the authority conferred upon him in that regard, from penalty or punishment so far as the general government is concerned, but they do not interfere with the exercise by the States of any authority they possess of preventing deception or fraud in the sale of property within their respective limits."² The Federal statute providing for the taxation of persons engaged in the manufacture and sale of oleomargarine does not authorize such manufacture and sale in a State where such State's laws forbid its sale.³

The Act of Congress of 1890⁴ is usually not in conflict with State laws upon the subject of adulteration of foods.⁵

**§ 25. Cottolene, Labeling as a "Lard Substitute"—
Legislative Determination Binding on Courts.**

Cottolene is probably a wholesome substance, possibly as much so as pure lard. As usually manufactured it resembles lard. Yet, notwithstanding this, a statute which requires it to be labeled "Lard Substitute" is valid. It prevents a deception being practiced upon the public. Thus when a statute provided that every person who manufactures or sells any substance made in the semblance of lard, or as an imitation thereof, or a substitute therefor, designed to take the place of lard, should cause the package containing it to be labeled "Lard Substitute;" and a provision provided that the Act should "not apply to cottolene, a compound consist-

² *Plumley v. Massachusetts*, 155 U. S. 461, 15 Sup. Ct. 154, 39 L. Ed. 223, affirming 156 Mass. 236, 30 N. E. 1127, 15 L. R. A. 839; *Capitol City Dairy Co. v. Ohio*, 183 U. S. 238, 22 Sup. Ct. 120, 46 L.

Ed. 171, affirming 62 Ohio St. 350, 57 N. E. 62, 57 L. R. A. 181.

³ *People v. Meyer*, 89 N. Y. App. Div. 185, 85 N. Y. Supp. 834.

⁴ Ch. 839. See Appendix.

⁵ *Crossman v. Lurmon*, 171 N. Y. 329, 63 N. E. 311.

ing of a mixture of beef stearine and refined cotton-seed oil, where the package shall be labeled with the word 'Cottolene;' " but cottolene shall not be manufactured in imitation of lard and should not contain any substance deleterious to health, it was held that any substance made in imitation of lard must be labeled; and that cottolene must also be labeled "Lard Substitute," as it resembled lard. If it were so labeled it could be sold. "There is no hardship in the requirement that cottolene manufactured so as to resemble lard shall be labeled 'Lard Substitute.' If cottolene is just as wholesome, just as good, and cheaper than lard, let it compete with the hog product on fair terms, under a label declaring the truth,—that it is a substitute for lard, and not lard, as it appears to be. It probably is true in this particular case that the package containing the cottolene was so marked that no intelligent purchaser could be deceived into believing that he was buying lard. But it is the province of the Legislature to determine what precautions must be observed to prevent deception in the sale of food products, and the courts have no power to substitute something else which they may deem to be equally as efficacious. It is only when the specific means prescribed by the Legislature to prevent such deception are arbitrary or prohibitive that the courts can interfere."¹ A statute which requires a seller of lard compounds and lard substitute to disclose to the purchaser by label or card the nature and ingredients of the article is valid, as an exercise of the police power of the State.²

§ 26. Imitation of Butter in Oleomargarine Produced by Combination of Natural Ingredients.

If a statute forbids the sale of oleomargarine which shall be in imitation of yellow butter produced from milk or cream, then it is immaterial how the imitation was produced,

¹ State v. Hanson, 84 Minn. 42, 86 N. W. 768, 54 L. R. A. 468; v. Snow, 81 Iowa 642, 47 N. W. 777, 11 L. R. A. 355.

State v. Aslesen, 50 Minn. 5, 52 N. W. 220, 36 Am. St. 620; State ² State v. Aslesen, 50 Minn. 5, 52 N. W. 220, 36 Am. St. 620.

whether by putting in coloring matter for that purpose or by a combination of materials out of which oleomargarine is made in such proportion as to produce a substance resembling or in imitation of butter. Either practice is forbidden. "If the article is in imitation of yellow butter, it matters not whether such imitation is brought about by the addition of a dye, or by the selection of ingredients. Color is the impression given to the eye by lines of light of various rates of vibration. The reason for the natural color of bodies is a difficult subject, and one that is scarcely yet understood. It has perhaps some relation to the molecular or atomic structure of such bodies; but there are no scientific distinctions, so far as producing color is concerned, between imitating or producing color by the addition of an ingredient known as a dye and added for the purpose alone of producing a given color, and the selection and addition of an ingredient which performs the same coloring functions, but at the same time adds other qualities to the compound. The words, 'which shall be in imitation of,' used in describing the contraband compound, imply a conscious imitation in the manufacture thereof. If one forming a compound of several ingredients knowingly select and use an ingredient which imparts to the compound the color of yellow butter, he having choice of ingredients, he will have made his compound in imitation of yellow butter just as well as if he selected a dye. There is, however, this difference, viz.: proof of the presence of the dye, which can have no other function than that of producing color, shows the conscious imitation quite clearly, while proof of the selection of the ingredients which produced the color of yellow butter, the person selecting having the choice of ingredients, is a fact from which the jury is authorized to infer a conscious imitation notwithstanding such ingredient so selected has other qualities, or is in one of its forms, or in one of its colors, a necessary ingredient of oleomargarine. Whether or not the article in question is in imitation of yellow butter can not be determined alone by its resemblance to yellow butter, but resemblance aided by evidence of the existence of a dye as one of its ingredients, or resemblance

aided by the evidence of the existence of available necessary ingredients which will not impart to the compound the color of yellow butter, and of the existence of other available ingredients which will impart to the compound the color of yellow butter, may be considered by the jury as establishing or tending to establish, conscious imitation by selection of ingredients. What is yellow butter, and whether the article in question is in imitation of yellow butter, are questions of fact."¹

A similar ruling has been made by the courts in other States.² But on the contrary it has been held that where a statute provided that no sale of oleomargarine should be made unless it was "free from coloration or ingredient that causes it to look like butter," did not prohibit the sale of imitation butter, in which the coloring substance was not used for that purpose alone, but was in itself one of the substantial ingredients of the combination.³ So where a statute prohibited the use of annatto, or any other coloring matter or substance, it was held that it included only those substances which in the manufacture of oleomargarine, are used, like annatto, solely or chiefly to color the product, and did not extend to the materials which are employed chiefly to make up the substance, and which impart color only as a necessary incident of their use.⁴ And where a statute provided that no person or corporation should manufacture out of any oleaginous substance, or any compound of it, other than that produced from unadulterated milk, or of the cream from it, or any article to take the place of butter or cheese produced from unadulterated milk, or cream of the same, or should sell or offer for sale the same as an article of food,

¹ Meyer v. State, 134 Wis. 156, 114 N. W. 501, 14 L. R. A. (N. S.) 1061, note; State v. Hammond Packing Co., 105 Minn. 359, 117 N. W. 606; McCann v. Commonwealth, 198 Pa. 509, 48 Atl. 470; State v. Armour Packing Co., 124 Iowa 323, 100 N. W. 59.

² State v. Armour Packing Co.,

124 Iowa 323, 100 N. W. 59; State v. Bockstruck, 136 Mo. 335, 38 S. W. 317.

³ Bennett v. Carr, 134 Mich 243, 96 N. W. 26.

⁴ State v. Newton, 50 N. J. L. 543, 14 Atl. 610, 2 Inter. State Com. 63.

should be liable to a fine; it was held that the prohibition was aimed at a designed and intentional imitation of dairy butter, and not a resemblance in qualities inherent in the articles themselves and common to both.⁵

§ 27. Milk Standard, Fixing.

The legislature has the power to fix a standard of purity for milk, and forbid all sales of milk below that standard; and it may confer that power upon municipalities to fix such a standard. Such a statute is not unconstitutional; nor is an ordinance enacted in pursuance of the power thus conferred upon a municipality.¹ Thus an ordinance forbidding the sale of milk containing less than seven-tenths of one percent of ash has been held not to be unreasonable or oppressive.² So a statute fixing the standard of milk at not over eighty-eight percent water, nor less than twelve percent solids, and not less than two and one-half percent milk fats, and providing that milk not of that standard shall be deemed adulterated, has been held valid.³ So a statute prohibiting the sale of adulterated milk, and providing that milk should be deemed adulterated, whenever it should on analysis show over

¹ *People v. Arensberg*, 105 N. Y. 123, 11 N. E. 277, 59 Am. Rep. 483; *People v. Dodd*, 63 Hun 583, 18 N. Y. Supp. 643; *People v. Meyer*, 14 N. Y. App. 1, 60 N. Y. Supp. 415; *Haines v. People*, 7 Colo. App. 467, 43 Pac. 1047.

A statute prohibiting absolutely the sale of oleomargarine is void. *Ex parte Scott*, 66 Fed. 45.

Coloring vinegar, *State v. Earl*, 152 Mo. App. 235, 133 S. A. 402.

² *St. Louis v. Ameln* (Mo.), 139 S. W. 429; *St. Louis v. Biffen*, 201 Mo. 528, 100 S. W. 1048; *St. Louis v. Scheer* (Mo.), 139 S. W. 434; *St. Louis v. Meyer* (Mo.), 139 S. W. 438; *St. Louis v. Jud* (Mo.)

139 S. W. 441; *St. Louis v. Kellman* (Mo.), 139 S. W. 443; *St. Louis v. Krumpeler* (Mo.), 139 S. W. 446; *St. Louis v. Schultz* (Mo.), 139 S. W. 449; *St. Louis v. Niehaus* (Mo.), 139 S. W. 450.

³ *St. Louis v. Liessing*, 190 Mo. 480, 89 S. W. 611, 1 L. R. A. (N. S.) 918; *State v. Dupaquier*, 46 La. 577, 15 So. 502, 26 L. R. A. 162, 4 Am. St. 334.

⁴ *State v. Smyth*, 14 R. I. 100, 51 Am. Rep. 344; *St. Louis v. Reuter*, 190 Mo. 514, 89 N. W. 628; *St. Louis v. Klausmeier*, 213 Mo. 119, 112 S. W. 516; *St. Louis v. Bippen*, 201 Mo. 528, 100 S. W. 1048.

eighty-seven percent water or under thirteen percent milk solids, has been sustained.⁴

These are questions for the Legislature to decide, and not for the courts or juries. It may be known to the Legislature that certain kinds of food produce different degrees of richness in milk, and it may be known to it that certain kinds of foods "will cause a greater flow of watery milk, and it may be shown to the Legislature that this watery milk supplied as a food to children cheats them with the appearance of nourishment and deprives them of that nutritious food which they need. It may be known to legislators, then, that milk below the standard which they fix by this law is unsuitable for food and should not be sold. At any rate all this is a matter for the Legislature. And although the courts may declare a law unconstitutional when it appears on the face that it is not intended to promote the public health and would have no such results, yet a law fixing the standard for the purity of milk on its face is evidently intended for public health, and such being the case, it is within the legislative power to enact it."⁵ Of a statute of this character the Supreme Court of New Hampshire said: "The statute tends to discourage the breeding of a certain class of cattle for the supply of the milk market. The difficulty of guarding against the adulteration of milk may have influenced the Legislature in fixing a standard of richness. Practically it makes no difference whether the milk is diluted after it is drawn from the cow, or whether it is made watery by giving her such food as will produce milk of an inferior quality, or whether the dilution regarded by the Legislature as excessive arises from the nature of a particular animal or a particular breed of cattle. The sale of such milk to unsuspecting consumers for a price in excess of the value is a fraud which the statute was designed to suppress. It is a

⁴ State v. Campbell, 64 N. H. 402, 13 Atl. 585, 10 Am. St. 419, note; Kansas City v. Cook, 38 Mo. App. 660; Commonwealth v. Evans, 132 Mass. 11.

⁵ People v. Cipperly, 101 N. Y. 634, 4 N. E. 107, adopting the dissenting opinion below in 37 Hun 324.

valid exercise by the Legislature of the police power for the prevention of fraud and the protection of the public health, and as such is constitutional."⁶ In Rhode Island the court said: "It is equally a fraud on the buyer, whether the milk which he buys was originally good and has been deteriorated by the addition of water, or whether in the natural state it is so poor that it contains the same proportions of water as that which has been adulterated. Again, since it may sometimes happen, though we presume infrequently, that milk as it comes from the cow is below the standard of quality, . . .¹ it would . . . be difficult . . . to prove its poor quality was due to adulteration, although in a large majority of cases such would probably be the fact. By putting such milk in the same category with adulterated milk, the prosecution is relieved from this difficulty." The court also held that the statute was not unconstitutional on the ground that it was unequal and partial in its operation and discriminated in favor of owners of cows which gave rich pure milk and against owners of cows giving milk of an inferior quality.⁷

⁶ *State v. Campbell*, 64 N. H. 402, 13 Atl. 585, 10 Am. St. 419.

⁷ *State v. Smyth*, 14 R. I. 100, 51 Am. Rep. 344.

"Without repeating the reasoning of the courts, it must suffice to say that the same principle is announced in *Weigand v. District of Columbia*, 22 App. D. C. 559; *State v. Fourcade*, 45 La. 717, 40 Am. St. 249, 13 So. 187; *State v. Dupaquier*, 46 La. 577, 26 L. R. A. 162, 49 Am. St. 334, 15 So. 502; *State v. Stone*, 47 La. 147, 15 So. 11; *Deems v. Baltimore*, 80 Md. 164, 26 L. R. A. 541, 45 Am. St. 339, 30 Atl. 648; *Blazier v. Müller*, 10 Hun 435; *Norfolk v. Flynn*, 101 Va. 473, 62 L. R. A. 771, 99 Am. St. 918, 44 S. E. 717; *State v. Smith*, 69 Ohio 196, 68 N. E. 1044; *Commonwealth v. Proc-*

tor, 165 Mass. 38, 42 N. E. 335; *People v. Kibler*, 106 N. Y. 321, 12 N. E. 795; *State v. Schlenker*, 112 Iowa 642, 51 L. R. A. 347, 84 Am. St. 360, 84 N. W. 698. So that the validity and constitutionality of the ordinance as a police regulation in the general characteristic and the general scope and purpose rest upon satisfactory reasons, as well as upon the great weight of authority in this country. The specific provision, the validity of which is that part of § 18 prohibiting the sale of milk showing an analysis of less than seven-tenths of one per cent of ash. This, in effect, is the same as fixing the amount of milk fats, or solid matter, that the milk must contain, which is one of the nutritious ingredients in milk, and the dimin-

So a statute requiring cream offered for sale to contain twenty percent of fat is valid; and the court can not say that it is an unreasonable regulation because there is no practice pursued in the adulteration of cream like there is in milk.⁸ The Legislature may define what shall constitute adulterated milk.⁹

ution of which deteriorates the quality of milk in a corresponding degree. Authorities above cited are all in harmony on the proposition that it is perfectly competent in the interest of the health of a community to fix the standard of quality, and that there is nothing unreasonable or oppressive in the ordinance in that respect." *St. Louis v. Liessing*, 190 Mo. 480, 89 S. W. 611, 1 L. R. A. (N. S.) 918, 109 Am. St. Rep. 774.

See also *Commonwealth v. Waite*, 11 Allen 264, 87 Am. Dec. 711; *Commonwealth v. Farren*, 9 Allen 489; *Polinsky v. People*, 73 N. Y. 65; *People v. Kibler*, 106 N. Y. 321, 12 N. E. 795; *People v. Cipperly*, 101 N. Y. 634, 4 N. E. 107, reversing 37 Hun 319, adopting the dissenting opinion therein. *People v. Bie-secker*, 169 N. Y. 53, 61 N. E. 990, 57 L. R. A. 178, 88 Am. St. 534.

⁸ "We cannot take judicial knowledge of the supposed facts thus asserted; for, if this is a matter in which we are required to take judicial notice of the facts, we know that it is entirely possible to mix pure cream with a limited amount of milk, and produce a mixture which may be sold to the inexperienced as pure cream. Undoubtedly there is less necessity for a statute to prevent deception in the sale of cream than there is one to prevent fraud in the sale of

milk, because the latter may be classed as a necessity, and the former as a luxury, and its sale not as general as that of milk; but the distinction is one of degree, not of principle. In either case the legislature is the sole judge of the necessity and propriety of preventing deception in the sale of the article, by appropriate legislation. And the legislature, by this statute, having in the exercise of the police power, fixed a standard for all cream to be sold as such, the act is valid." *State v. Crescent Creamery Co.*, 83 Minn. 284, 86 N. W. 107, 54 L. R. A. 466, 85 Am. St. 464.

⁹ *State v. Schlenker*, 112 Iowa 642, 84 N. W. 698, 51 L. R. A. 347, 84 Am. St. 360.

A statute requiring twenty percent of butter in cream is valid. *State v. Tetu*, 98 Minn. 351, 107 N. W. 953, 108 N. W. 470. So one requiring three per cent, by weight, of butter fat, estimated by a designated process. *St. Louis v. Bippen*, 201 Mo. 528, 100 S. W. 1048; *St. Louis v. Grafeman Dairy Co.*, 190 Mo. 507, 89 S. W. 627, 1 L. R. A. (N. S.) 926.

An ordinance preventing the sale of milk and cream containing coloring matter is valid. *St. Louis v. Polinsky*, 190 Mo. 516, 89 S. W. 625.

The legislature may prohibit the

§28. Adulteration Not Reducing Strength of Milk Below Standard Fixed by Statute.

A statute of Missouri declared that "Food shall be deemed to be adulterated: 1. If any substance or substances have been mixed with it so as to lower or depreciate or injuriously af-

sale of skimmed milk. *Kansas City v. Cook*, 38 Mo. App. 660.

The legislature may prohibit the delivery of diluted milk to butter or cheese factories. *People v. West*, 106 N. Y. 293, 12 N. E. 610, 60 Am. Rep. 452, affirming 44 Hun 162.

The legislature may make the sale of mixed pure milk and pure water an offense. *Commonwealth v. Waite*, 11 Allen 264, 87 Am. Dec. 111; *People v. West*, 106 N. Y. 293, 12 N. E. 610, 60 Am. Rep. 452.

Where an ordinance or statute provides that no person shall have in his possession, with intent to sell, any adulterated milk, and declares that milk shall be deemed adulterated if any substance has been mixed with it, so as to lower or depreciate or injuriously affect its strength, quality or purity, the court will take judicial notice that the addition of water lowers and depreciates the quality of milk of any standard, and the ordinance or statute prohibits the addition of water to milk, without reference to the standard obtained, notwithstanding the addition; and a complaint charging a sale of adulterated milk is not objectionable for failure to allege a fixed standard by which to judge the strength and quality. *St. Louis v. Ameln* (Mo.), 139 S. W. 429.

A statute providing that any person who shall adulterate milk in enumerated ways, with a view of selling or offering the same for sale, or shall deliver it to a purchaser, is not in conflict with an ordinance or other statute which declares that no person shall have any milk which is adulterated, for the first is leveled against the act of adulteration with the prescribed intent, so that for a person to be guilty under it he must create the contraband milk, while the latter is leveled against the act of having in possession the contraband milk with the intent to sell, under which it is only essential to a conviction that the person charged shall have had such milk in his possession with the interdicted intent. *St. Louis v. Ameln* (Mo.), 139 S. W. 429.

A statute which provides that whoever sells or offers or exposes for sale within the state any milk, or sells or offers for sale, or delivers to another, adulterated or unwholesome milk, shall be guilty of a misdemeanor, is not in conflict with an ordinance which provides that no person within the city shall have in his possession, with intent to sell, any adulterated milk, and prescribing what shall constitute adulteration, because the statute is silent with reference to "possession with intent to sell,"

fect its strength, quality or purity. 6. . . . In the case of dairy products, if any such product be drawn or produced from cows fed on unhealthy or unwholesome food, or on

which is made an offense by the ordinance. *St. Louis v. Ameln* (Mo.), 139 S. W. 429.

A section of a statute referred to a series of enumerated and interdicted kinds of milk, each connected with the other by the disjunctive conjunction "or," and solely related to the selling, offering, or exposing for sale any milk or cream of the several kinds described, and provided that whoever should sell or offer or expose for sale within the state any milk of the kinds specified, or should sell or offer for sale, or deliver to another, adulterated or unwholesome milk, should be guilty of a misdemeanor. The phrase, "injurious to the health," was used in connection with milk sold, offered, or exposed for sale, containing foreign substances or preservatives of any kind. Another section provided that food should be deemed adulterated if any substance was mixed with it, so as to lower or depreciate or injuriously affect its strength, quality or purity. It was held that these sections, when read together, prohibited the sale of milk within the state, the quality of which had been reduced by adding pure water, and that it was not the policy of the state to permit the sale of watered milk so long as a specific standard was retained. *St. Louis v. Ameln* (Mo.), 139 S. W. 429.

An ordinance prescribing a lower standard of non-fatty solids for milk sold within the city than that speci-

fied by a statute of the state, is not for that reason invalid or against the policy of the state. It is not void as discriminatory, on the theory that the inhabitants of the municipality are entitled to the same grade of milk to which the other inhabitants of the state are entitled, where the ordinance prohibits the having in possession impoverished milk within the municipality, with intent to sell, without reference to whether the possessor is a resident or a non-resident, and does not affect the application of the state law in the city. The ordinance is not repealed by the statute. The ordinance prohibited the sale of milk containing less than eight and five-tenths percent non-fatty solids, and the statute required milk sold within the state to contain not less than eight and seventy-five one hundredths per cent. It was held that the ordinance was not invalid, because it provided a different standard for milk sold within the city. Under the rule, so long as the ordinance, within the grant of municipal legislative power, falls within but does not exceed, and is not inconsistent with the state statute, there is no such conflict or inconsistency as to invalidate the ordinance. The ordinance was a mere exercise of proper municipal discretion not to bring the machinery of the city courts into operation to prosecute for violations in excess of the municipal standard,

waste, slops, refuse, leavings or residue of any nature or kind from distilleries, breweries or vinegar factories, or on food in a state of putrefaction, or from cows diseased in any way. . . . Or 10. If it does not conform to the standard of strength, quality and purity now or hereafter to be established by the United States Department of Agriculture." The United States Department of Agriculture established a standard for skim milk at "not less than 9.25 percent of milk solids;" and consequently if milk contained only 90.75 percent of water it did not violate this standard. It was contended that if pure water was added to milk, but not to exceed 90.75 percent of the entire bulk the statute was not violated; but the court was not willing to concede the rightfulness of such contention, and held that the putting of pure water into milk was a violation of the statute though the percentage of water was not increased beyond that permitted in milk taken directly from the cow.¹

§ 29. Unadulterated Milk Below Standard.

The State may forbid the sale of milk below a given standard, although it be unadulterated and come fresh from the animal. It may be known to the Legislature that certain kinds of foods produce different degrees of richness in milk, and it may be known to them that certain kinds of food

leaving the state to enforce its own law at all points and to the limit prescribed. *St. Louis v. Scheer* (Mo.), 139 S. W. 434; *St. Louis v. Klausmeier*, 213 Mo. 119, 112 S. W. 516; *St. Louis v. Meyer* (Mo.), 139 S. W. 438; *St. Louis v. Kellman* (Mo.), 139 S. W. 443; *St. Louis v. Schulte* (Mo.), 139 S. W. 449; *St. Louis v. Niehaus* (Mo.), 139 S. W. 450.

A city cannot prescribe a higher standard than that prescribed by a statute of the state. *St. Louis v. Schulte* (Mo.), 139 S. W. 449.

¹ *St. Louis v. Kruempeler* (Mo.), 139 S. W. 446.

This question was involved and incidentally discussed in the following cases: *St. Louis v. Ameln* (Mo.), 139 S. W. 429; *St. Louis v. Scheer* (Mo.), 139 S. W. 434; *St. Louis v. Meyer* (Mo.), 139 S. W. 438; *St. Louis v. Jud* (Mo.), 139 S. W. 441; *St. Louis v. Kellman* (Mo.), 139 S. W. 443; *St. Louis v. Kruempeler* (Mo.), 139 S. W. 446; *St. Louis v. Schulte*, (Mo.), 139 S. W. 449; *St. Louis v. Niehaus* (Mo.), 139 S. W. 450.

“will cause a great flow of watery milk, and it may be known to the Legislature that this watery milk supplied as food to children cheats them with the appearance of nourishment and deprives them of that nutritious food which they need. It may be known to legislators, then, that milk below the standard which they fix by this law is unsuitable for food and should not be sold. At any rate, all this is matter for the Legislature.”¹ “It is equally a fraud on the buyer, whether the milk which he buys was originally good and has been deteriorated by the addition of water, or whether in its natural state it is so poor that it contains the same proportion of water as that which has been adulterated. Again, since it may sometimes happen, though we presume infrequently, that milk as it comes from the cow is below the standard of quality, . . . it would . . . be difficult . . . to prove that its poor quality was due to adulteration, although in a very large majority of cases such would probably be the fact. By putting such milk in the same category with adulterated milk, the prosecution is relieved from the difficulty.” Nor is such a statute or ordinance invalid on the ground that it is unequal and partial in its operation and discriminates in favor of owners of

¹ *People v. Cipperly*, 101 N. Y. 634, 4 N. E. 107, 37 Hun 324; *People v. Eddy*, 59 Hun 615, 12 N. Y. Supp. 628; *State v. Layton*, 160 Mo. 498, 61 S. W. 171, 83 Am. St. 487, 62 L. R. A. 163; *St. Louis v. Liessing*, 190 Mo. 464, 89 S. W. 611, 1 L. R. A. (N. S.) 918, 109 Am. St. Rep. 774; *State v. Campbell*, 64 N. H. 402, 10 Am. St. 419, 13 Atl. 585; *Pain v. Boughtwood*, L. R., 24 Q. B. Div. 353, 53 J. P. 469; *People v. Kibler*, 106 N. Y. 323, 12 N. E. 795; *People v. Schaeffer*, 41 Hun 23; *Commonwealth v. Farren*, 9 Allen 489; *Commonwealth v. Warren*, 160 Mass. 533,

36 N. E. 308; *Kansas City v. Cook*, 38 Mo. App. 660.

“There is a great variation in the composition of milk in different breeds of cattle and also in different individuals of the same herd. For instance, the Holstein breed of cattle affords a milk with a very low content of fat, sometimes as low as three and twenty-five one-hundredths percent, and in individual cases lower. On the other hand, the Jersey breed of cattle affords milk of a very high content of fat: sometimes reaching as high as six percent, and in individual cases very much higher.” *Wiley, Foods and Their Adulteration* 169.

cows which give rich, pure milk and against owners of cows giving milk of inferior quality.²

§ 30. Tests for Determining Purity of Milk.

In prescribing the amount of milk solids which shall be necessary in milk offered for sale the usual statute or ordinance prescribes no test by which these solids shall be determined. In such an instance the only thing to be ascertained is "Did the milk possess the requisites prescribed by the statute or ordinance?"¹ A Missouri ordinance required the analysis of milk to show "not less than three percent by weight of butter fat, eight and five-tenths solids not fat, and seven-tenths of one percent ash, of which fifty percent shall be insoluble in hot water." In a provision it was declared "that in contested analysis of milk condemned under this ordinance, butter fat shall be estimated gravimetrically by the Adams paper coil process; total solids by evaporation, and nonfatty solids by difference between total solids and butter fat, and ash by weighing the residue after incineration of total solids at a dull red heat until all the organic matter is destroyed." In a case for a violation of this ordinance, several witnesses testified that the test imposed was not the best, but the result shown by the tests made in the

² *State v. Smyth*, 14 R. I. 100, 51 Am. Rep. 344.

Of an ordinance fixing a standard for milk, the Supreme Court of Missouri said: "Again, the ordinance is said to be void because passed without regard to the wholesomeness or adulteration of milk. That contention, we take it, means that the city has no power to regulate milk, otherwise than to prevent the sale of adulterated or diseased milk; in other words, has no power to prescribe a scientific standard, indicative of the nutritive contents of milk. Such is not the

law. The city may prescribe such standard, and milk that does not come up to it, whether fault of cow or dealer, may not be dealt in." *St. Louis v. Scheer* (Mo.), 139 S. W. 434, citing *St. Louis v. Reuter*, 190 Mo. 514, 89 S. W. 628; *St. Louis v. Grapeman Dairy Co.*, 190 Mo. 507, 89 S. W. 627, 1 L. R. A. (N. S.) 926; *St. Louis v. Liessing*, 190 Mo. 464, 89 S. W. 611, 1 L. R. A. (N. S.) 918, 109 Am. St. 774.

¹ *State v. Newton*, 45 N. J. L. 469.

case were not contradicted, and the ordinance was enforced.² In another Missouri case an ordinance required that the milk on analysis should show not less than three percent by weight of butter fat, "estimated gravimetrically by the Adams paper coil process." This ordinance was upheld. "The court can not say, as a matter of law, that it was unreasonable for the assembly to provide that the weight of the butter fat should be estimated, calculated, or ascertained gravimetrically, or measured by weight, nor that the adoption of the 'Adams paper coil process' was not a proper gravimeter. The assembly unquestionably had the right, dealing, as it was, with a scientific question, to fix a scientific standard, and in the absence of all showing to the contrary, this court can not take judicial cognizance that the Adams paper coil process was not a proper test. By so fixing it, a definite standard, controlling alike upon the city and the one charged with a violation of the ordinance, was established, and the weight of the milk can be ascertained scientifically, and not left to the uncertain opinions of witnesses, whether experts or laymen, and to the judgment of inspectors. On the contrary, if no fixed standard or test was established by ordinance, the vendor of the milk might well complain that his rights had been left to the unregulated judgment of the inspectors, or, if no one gravimeter had been specified, then he might well complain that different tests might lead to different results and to varying standards of purity. This ordinance looks to his protection by providing that, when an inspector takes a sample of milk or cream for analysis, 'the person, firm, or corporation from whom the sample is taken shall, on demand therefor, then and there, have a right to a duplicate of said sample, sealed with the seal of the officer, on tendering him a suitable receptacle therefor.' In this manner he can have his milk of the same quality tested by any disinterested chemist by the

² *St. Louis v. Liessing*, 190 Mo. 464, 89 S. W. 611, 1 L. R. A. (N. S.) 918, 109 Am. St. 774; *St. Louis v. Bippen*, 201 Mo. 528, 100 S. W. 1048; *St. Louis v. Grafeman Dairy Co.*, 190 Mo. 507, 89 S. W. 627, 1 L. R. A. (N. S.) 926.

same method, and is not conclusively bound by the analysis of the city chemist. The argument of convenience urged by defendant we do not regard as of great weight. The ordinance does not attempt to change the rules of evidence, but is scrupulous to preserve to the vendor evidence under the official seal of the inspector which he may submit to an unbiased, disinterested chemist, to be tested by identically the same standard as that which the city proposes to use to determine whether he has or has not violated the ordinance. He has his day in court, and by his counsel can subject the city chemist to the most rigid examination as to his method of testing the milk, and then, if adverse, meet it with the testimony of his own expert. The ordinance nowhere makes the test of the city chemist conclusive upon defendant. It simply fixes a standard, and leaves the question of whether or not his milk is up to the standard, according to the prescribed test for all alike, to be ascertained by settled principles of legal evidence. We think there is nothing to differentiate this case in principle from the others in which we have sustained the constitutionality of the ordinance.”

“The use of milk,” said the Supreme Court of Maryland, “as an article of food enters largely, as we all know, into the daily consumption of every household, and there is no more fruitful source of disease than the use of adulterated and unwholesome milk. And if the appellant’s contention be right, that the question whether or not milk, which is daily offered for sale in every part of a large and populous city, comes up to the standard prescribed by the ordinance, must be determined by the ordinary process of judicial investigation, or by chemical analysis, it would be impossible to prevent the danger to the public health necessarily resulting from impure and unwholesome milk. And it is absolutely necessary, therefore, that the appellee should have the power to provide for its inspection by proper means and instruments, and if, upon such inspection, it shall be found not to come up to the standard prescribed by the ordinance,

* *St. Louis v. Grafeman Dairy Co.*, 190 Mo. 507, 89 S. W. 627, 1 L. R. A. (N. S.) 926.

to direct that the offending thing shall be destroyed.”⁴ A statute which declares chemical analysis conclusive evidence of guilt, and incapable of contradiction except by other chemical analysis, is valid, not depriving a man of his liberty without due process of law.⁵

§ 31. Designating Officers to Determine Purity of Food—Analysis.

It is within the power of a State to designate an officer—as its chemist—to determine the purity of samples of food submitted to him, and even to make his analysis *prima facie* evidence. So a municipality may likewise designate an officer for that purpose. The fact that only one officer is designated does not render either the statute or ordinance invalid. “Dealers in milk,” said the Supreme Court of Missouri, “would unquestionably have a much more valid grievance if each case had to be submitted to the police justice or a jury, to determine the standard of milk according to their own ideas, and making their individual judgment a standard of right and wrong. The ordinance, as passed, instead of leaving the standard of milk to the caprice of the city chemist, contains a permanent legal provision which operates generally and impartially for its enforcement. The fact that the chemist has [been] charged with the duty of analyzing all milk submitted to him by the various inspectors in no sense deprives the seller of milk of any constitutional right. It was pointed out by the Supreme Court in *Fischer v. St. Louis*¹ that it was perfectly competent to delegate such a power as is conferred upon the city chemist by this ordinance to a single individual.” “Nowhere in the ordinance before us is an analysis of the city chemist made conclusive of the quality of the milk sold or offered for sale by a dealer in milk, but the particular section challenged in this case

⁴ *Deems v. Baltimore*, 80 Md. 164, 30 Atl. 648, 28 L. R. A. 541, 45 Am. St. 339. 319; *People v. Eddy*, 59 Hun 615, 12 N. Y. Supp. 628.

¹ 194 U. S. 361, 24 Sup. Ct

⁵ *People v. Cipperly*, 101 N. Y. 673, 48 L. Ed. 1018.
634, 4 N. E. 107, reversing 37 Hun

simply provides one uniform standard of quality of milk and for a uniform test in case of contested analysis of milk condemned under this ordinance. The owner of milk is in no manner deprived of his right to contest the analysis of the city chemist; but it is his right and privilege, when prosecuted for violation of this section, to have his milk tested by other competent chemists and by the same standard, so that it cannot be said that such dealers are deprived of the due process of law in the protection of their personal rights or property. The validity of the provisions providing for the inspection of milk violates no law or constitutional right of the defendant.”²

§ 32. Coloring Milk and Cream.

On the ground that the coloring of milk and cream is a deception on the public and an unfair advantage over honest competitors, a municipality may, under authority granted it to inspect milk, to secure the general health by any necessary measures, and to pass all ordinances expedient in maintaining the health and welfare of a city, forbid the sale of milk and cream containing coloring matter.¹

² *St. Louis v. Liessing*, 190 Mo. 464, 89 S. W. 611, 1 L. R. A. (N. S.) 918, 109 Am. St. 774; *State v. Newton*, 45 N. J. L. 475, 476; *Commonwealth v. Carter*, 132 Mass. 12.

¹ *St. Louis v. Polinsky*, 190 Mo. 516, 89 S. W. 625. Speaking of this case the court afterwards said: “We held in that case that adding annatto, whether harmful or not, in order to give milk the rich and golden color of milk from cows fed on green food, was a deception and a fraud upon milk users and on honest competitors, and that an ordinance prohibiting it was a reasonable and valid police regulation. That pronouncement was the unani-

mous resolution of this court in bank. It was made on a review of many authorities on full consideration, and has never since been shaken or exploded.” *St. Louis v. Jud* (Mo.), 139 S. W. 441. This case involved the use of annatto, which is a red or yellowish-red dye, prepared from the pulp surrounding the seeds of a tree of tropical America (*Bixa orellana*), and used for coloring cheese, etc.—*Webster's Dictionary*, lit. “Annatto.”

“A yellowish-red dye obtained from the pulp enclosing the seeds of the arnotto tree of Central America, the name used in commerce and literature. Its coloring being fugitive, its chief use is

§ 33. Milk of Cows Fed on Still Slop or from Diseased Cows.

The State may prohibit the sale of milk from cows fed on still slops, or slop from distilleries, or brewer's slop or brewer's grain; or milk from diseased cows. Such a statute is "aimed at offenses against public health, and is exercised under the police power of the State for the protection of the health of its citizens." "The development in the science of bacteriology in recent years," said the court, "has conclusively proved that the microbe is a most potent agent in the propagation of contagious diseases, and that there is no more favorable element for their absorption, growth and development than milk, and that milk contaminated by their presence communicates diphtheria, typhoid fever, tuberculosis,¹ and other kindred contagious diseases to human beings, especially to the young. And it is a matter of common knowledge that the conditions usually prevailing around places where 'still slop' is produced are also highly favorable to the development of many forms of bacilli. The heat, dampness and fermentation—all essential elements in the production of still slop—are favorable to germ growth. So that we may fairly presume that the general assembly, in its enactment of this statute, had sufficient information to justify its belief that milk from cows fed on still slop had ample opportunity to become impregnated with elements dangerous to the public health. Nearly every police regulation affects to some extent property rights; and whilst this power can not be made the excuse for oppressive and unjust legislation, the courts are not permitted to say that the Legislature may not enact laws apparently necessary for the public health. We have reached the conclusion that, under the facts of this case, this court has no power to hold that the general assembly did not have under the 'police power'

in coloring butter, cheese and varnish."—Standard Dictionary; lit. "Annatto."

¹ So far as tuberculosis being

communicated by animals to persons, there has been much dispute among scientists. See Wiley on Foods and Their Adulteration 13.

authority to enact the statute under which appellant was convicted."²

§ 34. Preservative in Milk—Formaldehyde.

The Legislature may enact a statute forbidding the use of any foreign substance in milk, cream or butter offered for sale, even the use of a preservative, whether for the purpose of increasing the quality of the milk or cream or butter or for preserving its condition or sweetness. And a municipality, under its usual powers to protect its inhabitants and protect their health, may adopt an ordinance to that effect. To put formaldehyde in milk, in order to preserve its sweetness, is a violation of such a statute or ordinance, and such a statute or ordinance is constitutional. It was claimed in one case "that because formaldehyde works such a chemical change in the character of milk that it will not sour, and because it is for this reason classed as a preservative, the municipal assembly could not lawfully prohibit its use in milk."¹

"The trial court refused to go into the evidence tendered that formaldehyde in proper quantities was not injurious to health. Evidently it can not be said that the effect of formaldehyde in milk is so well known not to be deleterious that the courts must take judicial cognizance of that fact. That its action is such that it changes the chemical properties of the milk so that it will not sour was established and conceded on the trial, and it was for this reason that it was insisted that, as it preserved the milk from souring, it was claimed to be highly beneficial. We can not accept this cou-

² *Sanders v. Commonwealth*, 117 Ky. 1, 25 Ky. L. Rep. 1165, 77 S. W. 358; *Condensed Milk Co. v. Montclair* (N. J. L.), 80 Atl. 30.

In *Johnson v. Simonton*, 43 Col. 242, which was an action for libel, the court said: "If indeed it is a fact that the milk of cows fed in whole or in part upon still slops is unwholesome as human food,

then have we no doubt of either the authority or the duty of the board to enact the ordinance in question."

¹ If a city be empowered to prevent the sale of adulterated "food," it may prevent the sale of adulterated milk. *State v. Stone*, 46 La. 147, 15 So. 11.

clusion. It must be recognized that it was a legislative function, in the passage of this ordinance for the preservation of health, to insist that milk should have neither adulterants nor preservatives placed in it, and to inquire as to the effect thereof. The municipal assembly may have investigated and found this very fact, that, when formaldehyde or boracic acid was placed in milk, it would change its chemical properties and prevent its souring, and prevent its going the natural processes of oxidation and decomposition, and that thereby the housewife desiring to have the milk sour for culinary purposes, or the physician administering it as food to children and sick persons, would be misled in his calculations as to its effect on his patients. But, in addition to this, the municipal assembly might well have reasoned that, while one preservative used in carefully prepared proportions might not be injurious to the health of consumers, it would be extremely dangerous to permit the vendors of milk, with little or no scientific knowledge, and less scruples, each to select his own so-called preservative and use it without knowledge as to the quantities which were safe, which would open the door to all sorts of dangerous adulterations, and to the use of highly injurious processes; and that the discovery of such practices might never be made until incalculable injury had occurred; and that the only safe course, considering the nature of the business, was to prevent absolutely the placing of such preservatives in milk having such an effect as was shown in this case. In so doing the municipal assembly in no manner destroyed or affected the defendant's right of property. He had the right to sell pure and unadulterated milk of the standard prescribed by the ordinance, and the purchaser and the consumer of milk had the right to purchase from him pure milk unmixed with any foreign matter added to it, and this was what the ordinance required, no more and no less, and in so doing it infringed no provision of the organic law of this State, or any article of the Federal Constitution."² "That the sale of milk to

² St. Louis v. Schuler, 190 Mo. 524, 89 S. W. 621, 1 L. R. A. (N. S.) 928. The court denied the soundness. People v. Biesecker, 169 N. Y. 53, 61 N. E. 990, 57 L. R. A. 178, 88 Am. St. 534.

which water and boracic acid have been added may amount to a fraud upon the purchaser is evident," said the Supreme Court of Iowa. "He has the right to assume that the milk he buys is unadulterated, and that it will go through the natural processes of oxidation and decomposition. He may wish to use sour milk for culinary purposes, and has the right to assume that nothing has been added to prevent chemical change. . . . It may be conceded that the milk sold by defendant was not harmful to the health of those who used it, but it is certainly dangerous to the public to permit milkmen and those dealing in milk to adulterate it in such manner as to change its constituent properties. The statute does not deprive the defendant of his property, but it does impose upon him the duty of so using it that no injury will result to others most likely to be affected by a disregard on his part of the reasonable health regulations that it enacts." In the case from which this last quotation is made the defendant put boracic acid in the milk which he sold, and testified that he used it as a preservative, and that its use was necessary to keep the milk from souring; and he introduced experts to show that the quantity of boracic acid used tended to prevent decomposition and would have no deleterious effect on the consumer. The court held that it was not enough to show that the defendant did not intend to defraud, or that the milk he sold was not unwholesome. If that were true, the court observed, almost any law intended to protect the public health and safety might be overthrown; that it was enough that the adulteration such as prescribed by the statute might depend and prove deleterious to the public health or comfort; that the Legislature might well determine that the adulteration of milk tends to facilitate vicious processes, and that it ought to be prohibited.³ An ordinance

³ *State v. Schlenker*, 112 Iowa 645, 84 N. W. 699, 51 L. R. A. 347, 84 Am. St. 360; *State v. Bockstruck*, 136 Mo. 336, 38 S. W. 317.

An ordinance prohibiting the sale of milk containing a preservative is valid and is within the

power to pass ordinances necessary or reasonably appearing to be necessary for the public health, even though a preservative not injurious to health be used. *St. Louis v. Schuler*, 190 Mo. 524, 89 S. W. 621, 1 L. R. A. (N. S.) 928.

which forbids the sale of milk and cream containing coloring matter is valid, because it prevents deception on the public and unfair advantage over honest competitors.⁴

§ 35. Preservative in Milk or Butter—Statute Invalid.

A statute of New York forbade the sale of or offer to sell butter or dairy products "containing a preservative," but permitted the use of salt in butter or cheese. It also forbade the advertising for sale "any substance, preparation, or matter for use in violation" of this statute. The defendant was charged with advertising a preservative called "preservaline" for use with butter "which was neither salt used in butter or cheese [nor] sugar to be used in milk," with the intent that the preservative should be used in butter to be offered and exposed for sale. The Court of Appeals held this statute invalid.¹

§ 36. Milk, Tuberculin Test.

An ordinance provided that all dairies whose owners sold milk within the limits of the city adopting it should be inspected by the veterinarian of the department of health, to be made of every animal producing milk for sale within the city, belonging to the applicant for a license to sell milk, and then provided that "for the purpose of detecting tuberculosis or other contagious or infectious disease, the veterinarian is authorized in making such inspection to use what is known as the tuberculin test as a diagnostic agency for the detection of tuberculosis in such animal." The court

⁴ *St. Louis v. Polinsky*, 190 Mo. 516, 89 S. W. 625. Such an ordinance is authorized by a statute empowering a city to inspect milk, to secure the general health by any necessary measure, and to pass all ordinances expedient in maintaining the health and welfare of the city. *St. Louis v. Wortman*, 213 Mo. 131, 112 S. W. 20.

¹ *People v. Biesecker*, 169 N. Y. 53, 61 N. E. 990, 57 L. R. A. 178, 88 Am. St. 54. The Supreme Court of Missouri denied the soundness of this case. (*St. Louis v. Schuler*, 190 Mo. 524, 89 S. W. 621, 1 L. R. A. (N. S.) 928), and held valid a statute preventing the use of preservative, although it was not injurious to health.

held that this provision of the ordinance was reasonable and valid.¹ There being conflicting scientific beliefs or theories on the question of danger of infection from bovine tuberculosis and of the efficacy of the tuberculin test, it is for the Legislature to determine upon which theory it will base its police regulations, and unless it clearly and manifestly is wrong the courts will not interfere.²

¹ *State v. Nelson*, 66 Minn. 166, 68 N. W. 1066, 34 L. R. A. 318, 61 Am. St. 399; *Nelson v. Minneapolis*, 112 Minn. 16, 127 S. W. 445, 29 L. R. A. (N. S.) 260; *New Orleans v. Chorouveau*, 121 La. 890, 46 So. 911, 18 L. R. A. (N. S.) 368, 126 Am. St. 332; *Borden's Condensed Milk Co. v. Montclair* (N. J. L.), 80 Atl. 30; *Adams v. Milwaukee*, 144 Wis. 371, 129 N. W. 518.

² *Adams v. Milwaukee*, 144 Wis. 371, 129 N. W. 518.

"It must be conceded that where, as in this case, the board of health makes the determination of the existence of disease depend upon a special method of diagnosis, that method must be, if not the most reliable, as reliable as any. The existence of disease is necessarily, to some extent, a matter of opinion or inference from established facts. The most skillful veterinarian may err. The most reliable symptoms may be deceptive, and absolute accuracy in diagnosis cannot be looked for. To demand it is a counsel of perfection not adapted to the exigencies of everyday life. Perfection of that degree is not attained under the diagnosis of human diseases, where the physician has the advantage of a patient able to state subjective symptoms and

give a history of the complaint. All that can be fairly required in the determination of the fact of disease is that the method of diagnosis should be well recognized, thoroughly approved, and as reliable as any. We find that the tuberculin test is the most reliable method of diagnosis in cattle now known; that, while it is not perfect, the percentage of error is as small as in any method suggested, and that it is more accurate than the method by physical examination. We rest this conclusion not merely upon the testimony in the case, but upon the fact that it has been approved by judicial decisions in Minnesota, Louisiana, Wisconsin and Pennsylvania. (*Limber v. Meadville*, in *Crawford Common Pleas*, Pennsylvania), and adopted by the most recent statutes in Delaware, Indiana, Maryland, Michigan, Minnesota, New Mexico, North Dakota, Oregon, Pennsylvania, South Carolina, Tennessee, Washington and Wisconsin, and for some purposes by Maine and Vermont. * * * These statutes are legislative testimony of cumulative force to the value of the tuberculin test as a diagnostic test. We think, therefore, that the board of health is justified in the position that cattle which react to the tuberculin test

"To protect the public," said the Supreme Court of New Jersey, "against danger from impure milk, some practicable method of ascertaining its impurity must be devised. One of the most serious dangers that may arise is the spread of an infectious or communicable disease, such as tuberculosis is declared to be by the Act of 1909. The argument is that the danger of communication of tuberculosis by means of milk is so slight as to be negligible, and the tuberculin test is therefore unnecessary; that it is not a sufficiently accurate method of determining the quality of milk to justify condemnation on no other ground than that the cows react to the test. Scientific men who have made a study of the subject are not agreed as to the probability of the communication of tuberculosis from cattle to man by means of milk and the seriousness of the danger. It seems to be established that there is very little chance of communication of bovine tuberculosis to human beings above the age of sixteen years, but that there is a very serious danger of communication through the medium of milk to human beings under sixteen years of age and especially to children under five years of age. It is conceded that there are such cases. The concession that bovine tuberculosis may be communicated to young children, and that, although it appears in them in the less common forms rather than in the form of pulmonary tuberculosis, suffices to justify action to guard the young against the contagion. It is for the board of health to decide how many lives there must be endangered, and whether the lives of a few infants or children are worth the effort and the financial loss. To suggest these considerations is to answer them. If the life of one child is endangered, extreme prudence may be proper. To secure protection to the young at any rate, it is necessary to adopt some method of determining whether or not milk exposed for sale is contaminated with the germs of tuberculosis. Probably the best, perhaps the only thor-

are diseased. That conclusion may occasionally be erroneous, but it is as nearly accurate as is possible. The statute empowers the board of

health to prohibit the sale of milk from such cattle." *Borden's Condensed Milk Co. v. Montclair* (N. J. L.), 80 At. 30.

ough way, of determining the character of the milk, is by a bacteriological examination of the milk itself; but this process is impracticable. It requires the use of high power microscopes, with which it is impossible to examine at any time more than an infinitesimal portion of the milk, and that portion may or may not be a fair sample of the whole bulk, while to examine specimens enough to reach a fair average requires so much time that a commodity as perishable as milk would spoil while being tested. We can not say that, in adopting the tuberculosis test, the board of health exceeded its legitimate function. That function is distinct from the function of the court." "We are not impressed by the suggestion that healthy cows may, and diseased cows may not, react to the tuberculin test; that many cows react that have had tuberculosis and recovered; that many that now have tuberculosis are likely to recover; and that it is possible for the producer of milk to destroy the value of the test by trick. These arguments would be of more importance if the board of health were undertaking to condemn to death all cattle that react. This they are not doing. If the cattle are likely to recover the owner may keep them until they do, and may use their product for any proper purpose. His loss is similar in kind, although perhaps greater in degree, than the loss of milk at the time of parturition. If the cows are in fact free from tuberculosis, or have already recovered, he could no doubt make a market for his milk upon establishing these facts.³ The fact that the value of the test may be destroyed by the trick of the owner of the cow only shows that the method is not perfect; few methods could be beyond the reach of deception. It is beside the point to suggest that, if this test were applied to human beings, eighty percent of mankind must be condemned as diseased. In dealing with human beings a different rule is followed from that which is applied in dealing with cattle, because men make the rule. The test might be applicable to human beings if it were proposed to use the produce of their bodies as food

³ "Provision is made for special cases by Section 7 of Article 8 of the Sanitary Code."

for others. A wet nurse might properly be subjected to a more stringent examination.”⁴

§ 37. Requiring Delivery of Sample of Milk for Inspection.

Milk dealers may be required to furnish samples of milk for inspection and analysis; and such requirements are valid. Thus where an ordinance required milk to be of a certain purity, and provided “that every vendor or establishment or person who sells milk shall be obliged to permit any sanitary officer or inspector of the board of health of the State for inspection and analysis on application therefor, a sample of the milk sold by said vendor or establishment or person from the can or other vessel from which it is sold to the public,” the sample not to exceed one-half pint, for which no charge could be made, it was held valid and a proper method of municipal legislation. Such an ordinance or statute does not force a milk dealer to furnish evidence of his guilt. “Appellant complains,” said the court, “that the ordinance is vexatious and oppressive, in that the inspectors are subject to no special and uniform rules to control their action. He claims it opens the door to favoritism and to the gratification of personal spite and prejudice; that the inspectors may harass the vendors of milk by unnecessary and repeated demands for samples. The mere fact that powers under an ordinance may be abused does not make the ordinance itself illegal, unreasonable, or oppressive. It is very difficult to so hedge in power conferred as to withdraw from it opportunities for wrongdoing. If such wrongdoing as appellant anticipates were to occur, we think that there are ample remedies at hand to correct and punish it. The efficiency of the inspection referred to in this case rests, to a great extent, upon the very uncertainty as to the time and place of inspection of which counsel complains. It would be an easy matter to prepare for inspections, if parties knew in advance precisely where and when they were to be made.” The court did not deem the requirement with respect to the

⁴ Borden's Condensed Milk Co. v. Montclair (N. J. L.), 80 Atl. 30.

furnishing of samples was a taking of property without compensation.¹

"We do not think," said the Supreme Court of Louisiana, "that the objections urged by appellant to the ordinance, that it deprives him of equal protection of the law; that it denies him protection in the enjoyment of his property; that it denies him protection in person and in property against unreasonable searches and seizures, and authorizes the invasion of the same without warrant founded on oath or affirmation; and that it deprives him of property and liberty without due process of law, are well founded. Defendant has selected as a business one which, improperly conducted, in the hands of unscrupulous men, would seriously affect the health of the public. It is no longer a debatable question whether callings of that character can be legally brought under reasonable restraints and regulations through the exercise of the police power. The object of the ordinance in question is to protect the general public against dishonest vendors in milk. Its effect will be, not only to injure appellant, but to protect him, as a member of the public, from that class of persons, and, incidentally, to serve him, as an honest vendor in that business, from injurious competition through fraudulent devices and ill practices. Honest vendors could certainly see nothing to flow from the ordinance but proper and beneficial results. They certainly should raise no complaint at having their own actions brought to a test, when, in so doing, they purge the business of disreputable characters. We do not think the ordinance was beyond the scope of the police power of the city, nor that, considered as a health ordinance, it bears no substantial relation thereto. We are of the opinion that in delegating to the common council as it did, the Legislature contemplated that it would adopt a reasonable system to render the power effective. We agree

¹ *State v. Dupaquier*, 46 La. 577, 15 So. 502, 26 L. R. A. 162, 49 Am. St. 334; *St. Louis v. Liessing*, 190 Mo. 464, 89 S. W. 64, 1 L. R. A. (N. S.) 918, 109 Am. St. 774; *Commonwealth v. Carter*, 132 Mass. 12; *Shivers v. Newton*, 45 N. J. L. 469; *Blazier v. Miller*, 10 Hun 435.

with plaintiff's counsel that a reasonable method of inspection of the milk offered for sale to the public falls legitimately under the grant of power. There are two methods of inspection: The first is to compel the vendor to exhibit the articles he proposes to dispose of to a public officer as a condition precedent to their sale; but inasmuch as there are certain cases where the prior inspection would fail of accomplishing its purpose, by reason of the facility offered for subsequently tampering with the goods inspected, a second system is often had recourse to. Under this system the vendor is permitted to proceed with his sales without prior inspection, but with the obligation to submit his commodity to inspection when the latter think it necessary to demand an examination. The penalty is laid upon the sale, not of uninspected wares, but of the improper ones. We are of the opinion that the liability at any moment to call for inspection, together with the dread of the penalty following detection, operates strongly, by way of prevention, against the perpetration of frauds, and, as counsel well says, 'are the most effective of checks against the sale of adulterated food, and the object of the law, otherwise unattainable, is accomplished'.²

Where a statute provided that no person should sell, or exchange, or offer or expose for sale or exchange, any unclean, impure, unhealthy, adulterated or unwholesome milk, and declared that if the milk had been delivered by the "producer" for sale or shipment, or from a "milk vendor who produces" the milk which he sold, and it was designed to prosecute such producer, a sample should be taken from the "mixed milk of the herd of cows" from which the milk claimed to be adulterated was drawn, it was held that the statute was not unconstitutional in that it required a test of the milk of the herd to be made when it was sought to prosecute the producer, while it authorized a conviction of the milk vendor on sample taken from the milk sold by him.³

² State v. Dupaquier, 46 La. 577,
15 So. 502, 26 L. R. A. 162, 49 Am.
St. 334; State v. Capitol City

Dairy Company, 62 Ohio St. 350,
57 N. E. 62, 57 L. R. A. 181.

³ People v. Laesser, 79 N. Y. App.
Div. 384, 79 N. Y. Supp. 470.

§ 38. Forcible Seizure of Samples of Milk Without a Warrant.

A statute of the State which authorizes all milk inspectors to enter all carriages used in the conveyance of milk, and, whenever they have any reason to believe any milk found therein is adulterated, to take specimens of it for the purpose of analyzing or otherwise satisfactorily testing it, is a valid exercise of the police power, and does not compel a dealer to furnish evidence of his own guilt. If the seizure is such as is authorized by the Constitution and a law passed in pursuance of it, the fact that the thing seized may be used in evidence against the person from whose possession it is taken does not render the seizure itself a violation of a clause in the usual Declaration of Rights that no man shall be compelled to give evidence against himself.¹

"It is said that the provision is unconstitutional because it authorizes the taking of property without consent or compensation, warrants unreasonable searches and seizures, compels one to furnish evidence against himself, and is not within the police power of the commonwealth. An analysis of a specimen of milk offered for sale is an appropriate means of carrying into effect the various provisions of the statutes regulating the sale of milk in this commonwealth." "If the statute had required that all milk offered for sale should first be inspected, it could be hardly contended that the trifling injury to property occasioned by taking samples for inspection would be such a taking of private property for public use as to require that compensation be made therefor. Such an injury to property is a necessary incident to the enforcement of reasonable regulations affecting trade in food. Private property is held subject to the exercise of such public rights for the common benefit; and in the case of licensed dealers in merchandise, the injury suffered by inspection is accompanied by advantages which must be regarded as a sufficient compensation. Instead of requiring

¹ Commonwealth v. Carter, 132 Mass. 12; State v. Doris, 117 Mo. 614.

milk offered for sale to be first inspected, the Legislature, for obvious reasons, has permitted licensed dealers to sell milk without inspection; has imposed penalties for selling adulterated milk; and has provided that, when the inspector of milk has reason to believe that any milk may be adulterated, he may take specimens thereof, in order that, by analysis, he may determine whether the milk has been adulterated. Such a seizure of milk for the purpose of examination is a reasonable method of inspection, and does not require a warrant. It is a supervision, under the laws of the State, by a public officer, of a trade which concerns the public health, and it is within the police power of the commonwealth.²

There is nothing in this case which requires us to determine the rights of the defendant if the inspectors had attempted to take a larger quantity of milk for analysis than was reasonably necessary for the performance of his duties. We have not found it necessary to consider whether the defendant, by voluntarily accepting a license to sell milk, has not assented to the conditions and regulations which the Legislature has seen fit to impose upon the exercise of the trade licensed."³

§ 39. License to Sell Milk, Power of Municipality to Exact.

Whether or not a municipality may exact a license for the sale of milk depends upon its charter or some statute authorizing it to exact it. Usually statutes on this subject are of such certainty that little controversy can arise over the attempt to confer the power.¹ But the power to exact the license does not fall within the scope of the usual general

² Citing *Commonwealth v. Ducey*, 126 Mass. 269, and *Jones v. Root*, 6 Gray 435.

³ *Commonwealth v. Carter*, 132 Mass. 12; *State v. Dupaquier*, 46 La. 577, 15 So. 502, 26 L. R. A. 162, 49 Am. St. 334; *St. Louis v. Liessing*, 190 Mo. 464, 89 S. W. 611.

1 L. R. A. (N. S.) 918, 109 Am. St. 774.

¹ See *St. Louis v. Grafeman Dairy Co.*, 190 Mo. 507, 89 S. W. 627, 1 L. R. A. (N. S.) 936; as an instance of this kind, *Littlefield v. State*, 42 Neb. 223, 60 N. W. 724, 28 L. R. A. 588.

welfare clause of municipal charters.² Where a city charter authorized a city to inspect and provide against the adulteration of milk or cream sold, or bought to be sold, in the city, it was held that it did not either expressly or impliedly authorize it to demand a license from persons engaged in the sale of milk.³ But in New Jersey, where no express power was given to require a license fee, yet it was held that the city board of health had the power to require a license fee sufficient to pay the expenses of license and the necessary expense of inspecting the milk, under a statute authorizing it to prohibit the sale of, or having in possession for sale, any milk containing any unhealthful ingredient, or which had been transported or stored in an unclean manner or place, or which was produced from diseased cows, or cows stabled under unhealthful conditions.⁴ If the State has undertaken to regulate the sale of milk and to license the business, then a municipality can not claim implied power to require license from milk dealers.⁵ This is particularly true where a city charter forbids the enactment of an ordinance upon any matter which is regulated by public statute, and there is a statute which provides full regulations in respect to the adulteration of milk. In such an instance the municipality has no power to regulate the sale of impure milk by requiring a license from the owner of vehicles by means of which the business is carried on.⁶ So where a statute regulated the sale of milk and expressly provided that any ordinance passed under it should not be in conflict with it; and the State granted a license to a milk dealer, it was held that a municipality in which he was licensed to sell milk could not destroy the privilege thereby conferred on him, by refusing him a municipal license except upon payment of an inspection fee, the fee being to all intents and purposes an addi-

² *Bear v. Cedar Rapids*, 147 Iowa 341, 126 N. W. 324, 27 L. R. A. (N. S.) 1150; *Mayher v. Lexington*, 8 Ky. L. Rep. 138.

³ *Gray v. Wilmington*, 2 Marv. (Del.) 257, 43 Atl. 94.

⁴ *Blanke v. Board of Health*, 64 N. J. L. 42, 44 Atl. 847.

⁵ *Bear v. Cedar Rapids*, 147 Iowa 341, 126 N. W. 324, 27 L. R. A. (N. S.) 1150.

⁶ *State v. Tyrrell*, 73 Conn. 407, 47 Atl. 686.

tional license.⁷ A municipality, however, under the power to license can not exercise such power to raise revenue. Such power must be exercised as a means of regulation only. Nor can the Legislature authorize the power of taxation under the pretense of sanitary regulation or other exercise of police power of the State in the interest of the public health or safety. But "such a measure will be upheld by the courts wherever it appears to have been designed to promote the welfare of the public, and the revenue derived therefrom is not disproportionate to the cost of its enforcement and the regulation of the business to which it applies."⁸

§ 40. Requiring Permit to Sell Milk.

A statute which provides that "No milk shall be received, held, kept or offered for sale or delivered" in a particular city "without a permit in writing from the Board of Health and subject to the conditions thereof," is valid, being a rea-

⁷ *St. Paul v. Peck*, 78 Minn. 497, 81 N. W. 389; *State v. Elofson*, 86 Minn. 103, 90 N. W. 309; *Burlington v. Bumgardner*, 42 Iowa 673.

⁸ *Littlefield v. State*, 42 Neb. 223, 60 N. W. 724, 28 L. R. A. 589 (a license fee of \$10 for a milkman is reasonable); *State v. Hoboken*, 41 N. J. L. 71; *People v. Mulholland*, 82 N. Y. 324, 37 Am. Rep. 568; *Van Baalen*, 40 Mich. 258; *Chicago v. Bartie*, 100 Ill. 57; *Kinsley v. Chicago*, 124 Ill. 359, 16 N. E. 260.

To an application for a mandamus to secure a license to sell milk, it is a good answer to allege that the applicant had been refused a license on the ground that he had been selling unclean milk. *People v. Gilman* (N. Y.), 103 N. Y. Supp. 954.

An ordinance made it unlawful to drive a milk wagon over the

streets of a city without a license. It also prohibited the peddling of any goods and wares in or along such streets without a license, and this paragraph was followed with a definition of a peddler, and with a proviso that the section should not apply to farmers selling the products of their own farms. The defendant resided outside the city, and was arrested while driving a milk wagon in which he had nothing but milk from cows kept on his farm, which he was selling to his customers in the city. It was held that the ordinance required him to take out a license for driving the milk wagon on the streets, and he was not excepted by the proviso, which related only to the license required to be taken as a peddler. *Macon v. Cumberland*, 92 Md. 451, 48 Atl. 136.

sonable enactment, and being neither a violation of the Federal or State Constitution. "In great cities," said the court, "where, in certain sections, life exists under crowded conditions that can not be fully comprehended unless seen, and where many articles for table consumption by all classes of the community are liable to pass through processes and conditions little short of appalling unless regulated by law, the full and vigorous exercise of the police power in the interests of the public health and general welfare is absolutely essential. It is quite impossible that every offender against the provisions of the sanitary code should be accorded due process of law as embracing jury trial and the slow results of the ordinary procedure in the courts. The vesting of powers more or less arbitrary in various officials and boards is necessary if the work of prevention and regulation is to ward off fevers, pestilence and the many other ills that constantly menace great centers of population. . . . The requirement that the relator should not sell milk without a permit is reasonable and violates neither the Federal nor State Constitution [and] is in accordance with law and long-established precedent."¹

§ 41. Registration of Milk Dealers—License.

Under an authority to provide for the inspection of milk, a municipality may require the vendors of milk to register in one of the offices, or in the office of the health commissioner, and pay a fee—as one dollar—for registration; for the fact that the selling of milk is a lawful trade or business does not exempt it from reasonable police regulations. So power conferred upon a municipality to make provision for the inspection of milk, and to license occupations, authorizes it to license milk vendors as distinguished from general mer-

¹ *People v. Vandecarr*, 175 N. Y. 440, 67 N. E. 913, 108 Am. St. 781, affirming 81 N. Y. App. Div. 128, 80 N. Y. Supp. 1108, and affirmed 199 U. S. 552, 26 Sup. Ct. 144, 50 L. Ed. 305. See also *Walton v. Toledo*, 23 Ohio Cir. Ct. Rep. 547; *Birmingham v. Goldstein*, 151 Ala. 473, 44 So. 113, 125 Am. St. 33; *Salt Lake City v. Howe* (Utah), 106 Pac. 705; *In re Watson* 17 S. D. 486, 97 N. W. 463.

chants.¹ "The provision requiring vendors of cream and milk to register with the health commissioner and pay a registration fee," said the court, "was clearly a valid police regulation, looking to the protection of the health and administering to the welfare of the public, and came strictly within the charter powers of the city of St. Louis, giving authority for the inspection of milk, and license from the inspector is a guaranty to the community that they can with safety purchase milk from the dealer thus registered and licensed. This provision was clearly not a tax, but merely as an inspection fee, designed as a compensation for the service rendered. The fact that the selling of milk is a lawful trade or business does not exempt it from reasonable police regulations. In *Gundling v. Chicago*² the Supreme Court of the United States tersely stated the recognized rule on this subject: Regulations respecting the pursuit of a lawful business or trade are of very frequent occurrence in the various cities of the country, and what such regulations shall be, and to what particular trade, business or occupation they shall apply, are questions for the city to determine, and their determination comes within the proper exercise of the police power of the city; and unless the regulations are so contrary, unreasonable and extravagant in their nature and purpose that the property and personal rights of the citizens are unnecessarily and in a manner wholly arbitrary interfered with or destroyed without due process of law, they do not

¹ *St. Louis v. Grafeman Dairy Co.*, 190 Mo. 492, 89 S. W. 617, 1 L. R. A. (N. S.) 937; citing *St. Louis v. Fischer*, 167 Mo. 654, 67 S. W. 872, 64 L. R. A. 679, 99 Am. Rep. 614; affirmed 194 U. S. 362, 24 Sup. Ct. 673, 48 L. Ed. 1018; *Norfolk v. Flynn*, 101 Va. 473, 44 S. W. 717, 99 Am. St. 918, 62 L. R. A. 771; *Gundling v. Chicago*, 177 U. S. 183, 20 Sup. Ct. 633, 44 L. Ed. 725; *State v. McKinney*, 29 Mont. 375, 74 Pac. 1095; *State v. Bixman*, 162 Mo. 1, 62 S.

W. 828; *St. Louis v. Polinsky*, 190 Mo. 516, 89 S. W. 625; *St. Louis v. Schuler*, 190 Mo. 524, 89 S. W. 621, 1 L. R. A. (N. S.) 928.

In *St. Louis v. Grafeman Dairy Co.*, supra, it was also held that a provision in the ordinance requiring payment of a fee to the "city collector" was not void, the statute designating the one who is to receive it or the "license collector."

² 177 U. S. 183, 20 Sup. Ct. 633, 44 L. Ed. 725.

extend beyond the power of the State to pass. When it is considered that no article of food is more universally used by the public, and that no other article is perhaps so sensitive to atmosphere and vegetable influences as milk, and that it is within a common knowledge that impure milk is a fruitful source of disease and disorders, especially among children, it needs no discussion to show that the milk business is one which particularly falls within the power of the State and its municipality to regulate, and that the imposition of one dollar a year for registration is in no sense an onerous or unjust burden, and is intended as a pure police measure to cover in part the cost of inspection of milk and cream, is too plain for discussion."³

A statute which requires a registration with the live stock sanitary board of all herds or cattle of persons selling milk for consumption in municipalities is a valid exercise of the police power of the State, and it does not deprive milk dealers of their property without due process of law. If it applies to all persons so supplying milk it is valid, even though it does not apply to every person who may occasionally sell milk in the country. And, as has been said before, a statute which prohibits the sale and shipment of milk to supply municipalities from premises found in an unsanitary condition, until they conform to reasonable sanitary regulations is a valid exercise of the State's police power, although it interferes to some extent with property rights.⁴

³St. Louis v. Grafeman Dairy Co., 190 Mo. 492, 89 S. W. 617, 1 L. R. A. (N. S.) 938.

Licenses for the sale of milk have been upheld in other states. Littlefield v. State, 42 Neb. 223, 60 N. W. 724, 47 Am. St. 697, 28 L. R. A. 588; Chicago v. Barte, 100 Ill. 57; Norfolk v. Flynn, 101 Va. 473, 44 S. E. 717, 62 L. R. A. 771, 99 Am. St. 918; State v. Nelson, 66 Minn. 166, 68 N. W. 1066, 34 L. R. A. 318, 61 Am. St. 399.

An ordinance granting the power

to the mayor of a city to issue licenses to sell milk to such persons as he thought proper is valid. People v. Mulholland 19 Hun 548.

But an ordinance exacting a license to sell milk except from the owner of two cows only, peddling milk by hand, has been held invalid. Pierce v. Aurora, 81 Ill. App. 674.

⁴State v. Broadbelt, 89 Md. 565, 43 Atl. 771, 45 L. R. A. 433, 45 Am. Rep. 433; State v. Nelson, 66 Minn. 166, 68 N. W. 1066, 34 L. R. A. 318, 61 Am. St. 399.

§ 42. License Tax on Dairy Business Measured by Number of Cows Kept or Wagons Used in Business.

It is not only permissible to exact a license of dairymen selling milk within a municipality, but the amount of the tax may be measured by the number of cows he employs in his business. In one particular case the tax was fifty cents per cow; and this tax was imposed by an ordinance. A power given a municipality to license, tax and regulate all kinds of business, and providing that this power "may be used in the exercise of the police powers as well as for the purpose of raising revenue, one or both," authorizes the adoption of such regulations. Such an imposition is a license tax on the occupation of carrying on a dairy and not on the property vested in the business. Such a tax is not unreasonable, and it is uniform in its operation. It is a proper classification.¹

¹ Birmingham v. Goldstein, 151 Ala. 473, 44 So. 113, 125 Am. St. 33, 12 L. R. A. (N. S.) 568; Norfolk v. Flynn, 101 Va. 473, 44 S. E. 717, 99 Am. St. 918, 62 L. R. A. 771.

An ordinance imposing a license fee upon every livery stable keeper in proportion to the number of horses or carriages kept is valid. Howland v. Chicago, 108 Ill. 496; Wilson v. Lexington, 105 Ky. 765, 49 S. W. 806, 50 S. W. 834, 20 Ky. L. Rep. 1593, 1980; Smith v. Louisville, 9 Ky. L. Rep. 779, 6 S. W. 911; Johnston v. Macon, 62 Ga. 645; Burlington v. Unterkircher, 99 Iowa 404, 68 N. W. 795; Brown v. Galveston, 97 Tex. 1, 75 S. W. 488; Gibson v. Coraopolis, 22 Pittsb. L. J. (N. S.) 64. *Contra* Cullinan v. New Orleans, 28 La. 102; Williams v. Garignes, 30 La. 1094.

A license fee on each room of a hotel or boarding house or a parlor or bedroom is valid. St. Louis v.

Birches, 76 Mo. 431, affirming 7 Mo. App. 169. So is one of \$60 on every billiard table kept for hire. Meriam v. New Orleans, 14 La. Ann. 318 (*Contra* Knox City v. Thompson, 19 Mo. 523, and State v. Endom, 23 La. Ann. 663); or \$25 for each cab or hack using a portion of the city streets as a private hack stand. New York v. Reesing, 77 N. Y. App. Div. 417, 79 N. Y. Supp. 331, affirming 38 N. Y. Misc. 129, 77 N. Y. Supp. 82. So a license is valid that imposes a license fee of so much per boat or skiff kept for hire. Poyer v. Desplaines, 22 Ill. App. 576, and so is one in proportion to the number of wagons used in handling oil. Spiegler v. Chicago, 216 Ill. 114, 74 N. E. 718, and one based upon the number of sheep or lambs kept by those engaged in grazing, herding and pasturing, usually being a stated sum per hundred or thousand head. Plumas County v.

So an ordinance imposing a license fee of fifty cents on each cow a dairyman has who sells milk within a municipality and two dollars on each milk stand he maintains therein is valid, even though the ordinance imposing it provides that the amount thus secured shall be used to pay the salary of a milk inspector. Nor is it any objection to such an ordinance that the cows are kept without the municipality, if he sells milk within its limits. "The means adopted seem to us to be reasonable. It was necessary to the end in view that there should be an inspector, that he should have the power to take samples of the milk and have them analyzed, and his duties involved expenses which it was proper that those engaged in the sale of milk should bear. A license from the inspector was evidence to the community that they could with safety purchase milk from the dealer to whom it was issued. He who is licensed should not complain, because he derives a direct and important benefit from it, for which he is required to pay a reasonable compensation. The dealer discovered in improper practices in the effort to foist upon the community milk unfit for use has no right to complain if he has been detected in such practices. What the dealers are required to pay by the ordinance is not for the purpose of revenue, and

Wheeler, 149 Cal. 758, 89 Pac. 909; affirmed 196 U. S. 562, 25 Sup. Ct. 316, 49 L. Ed. 509; *Sierra County v. Flanigan*, 149 Cal. 769, 87 Pac. 913. *Ex parte Miranda*, 73 Cal. 365, 14 Pac. 888. *Contra* *Cache County v. Jensen*, 21 Utah 207, 61 Pac. 303.) So is a license fee imposed on a street railway company in proportion to the number of cars they may operate. *Byrne v. Chicago General R. Co.*, 169 Ill. 75, 48 N. E. 703, affirming 63 Ill. App. 438; *Cincinnati St. R. Co. v. Cincinnati*, 8 Ohio N. P. 80; *Cincinnati Inclined Plane R. Co. v. Cincinnati*, 52 Ohio St. 609, 44 N. E. 327; *Newport v. South Cov-*

ington, etc., R. Co., 89 Ky. 29, 11 S. W. 954, 11 Ky. L. Rep. 319; *New York v. Third Ave. R. Co.*, 42 N. Y. Misc. 599, 87 N. Y. Supp. 584, affirmed without an opinion, 115 N. Y. App. Div. 899, 101 N. Y. Supp. 1116; *State v. Hilbert*, 72 Wis. 184, 39 N. W. 326; *New York v. Forty-second, etc., R. Co.*, 52 How. Pr. 106; *Union Pass. R. Co. v. Philadelphia*, 83 Pa. 429; *New York v. Third Ave. R. Co.*, 117 N. Y. 406, 22 N. E. 755; *Harrisburg v. East Harrisburg Pass. R. Co.*, 4 Pa. Dist. R. 683; *New York v. Broadway & 8th Ave. R. Co.*, 97 N. Y. 275; *Harrisburg v. Citizens' Pass. R. Co.*, 4 Pa. Dist. R. 687.

is not a tax, but is an inspection fee, designed as a compensation for the service rendered.'''²

All the cases, however, do not agree with those just cited. Thus where an ordinance provided that every dairy keeper within certain designated limits of a municipality should pay an annual tax of two dollars for each cow he employed in his dairy business, it was held that it was void, because it was a tax on property and not a license tax; and also because it did not apply equally to all those engaged in the dairy business within the limits of the municipality.³ So where an ordinance for the licensing of milkmen fixed the amount to be paid for the license, and then added fifty cents for each additional cow added to the licensee's stable, it was held void on the ground that the fee imposed for each additional cow exceeded the amount permitted by the municipal charter to be charged as a license fee.⁴

§ 43. Inspection of Dairies.

A State has power to require vendors of milk to submit to an inspection of their dairies by an official inspector before selling the milk; and if they are not up to a fixed standard which insures the purity of the milk there produced, to prohibit its sale. And a city, under its usual powers to require an inspection of milk, may adopt an ordinance requiring all vendors of milk within a city not only to submit their milk to an inspection, but also their dairies, even though such dairies lie beyond the city limits. Such an ordinance is

² *Norfolk v. Flynn*, 101 Va. 473, 44 S. E. 717, 62 L. R. A. 771, 99 Am. St. 918.

³ *Orleans Parish v. Nougues*, 11 La. Ann. 739.

⁴ *In re Taylor*, 11 Manitoba L. R. 420.

Municipal ordinances imposing a license fee for every wagon used by milkmen in retailing milk have been held void where the charter did not warrant their adoption.

Reading v. Bitting, 167 Pa. 21, 31 Atl. 359. But they have been held valid where the charter authorized their adoption. *Walton v. Toledo*, 23 Ohio C. C. 547; *People v. Mulholland*, 19 Hun 548; affirmed 82 N. Y. 324, 37 Am. Rep. 568.

A fee of one dollar per year on each wagon used is a reasonable amount. *Walton v. Toledo*, 23 Ohio Cir. Ct. Rep. 547.

valid.¹ This phase of the question can be reached by requiring a license to sell milk and exacting of the dairyman that he will consent to an inspection of his premises.²

§ 44. Destroying Impure Milk and Food.

A statute or ordinance may authorize an inspector, on finding the milk offered, or intended to be offered, for sale is below the standard it fixes, or is impure, to destroy it. Such a statute or ordinance is within the police power of the State; and it may be exercised for the protection of the public. The destruction of the milk is necessary to prevent danger to life and health which would result from the use of it in an impure condition.¹

So likewise impure food offered for sale, or even intended for sale, on the market may be seized and destroyed.² "The right to so seize is based upon the right and duty of the State to protect and guard, as far as possible, the lives and health of its inhabitants, and that it is proper to provide that food which is unfit for human consumption shall be summarily seized and destroyed to prevent the danger which would arise from eating it. The right to seize and destroy is, of course, based upon the fact that the food is not fit to be eaten. Food that is in such a condition, if kept for sale or in danger of being sold, is in itself a nuisance of the most dangerous kind, involving, as it does, the health, if not the lives, of persons who may eat it."³

¹ *Norfolk v. Flynn*, 101 Va. 473, 44 S. E. 717, 99 Am. St. 918, 62 L. R. A. 771; *State v. Nelson*, 66 Minn. 166, 68 N. W. 1066, 34 L. R. A. 318, 61 Am. St. 399; *State v. Broadbelt*, 89 Md. 565, 43 Atl. 771, 45 L. R. A. 433, 73 Am. St. 201; *Walton v. Toledo*, 23 Ohio Cir. Ct. Rep. 547; *Adams v. Milwaukee* 144 Wis. 371, 129 N. W. 518.

² *State v. Nelson*, *supra*.

³ *Blazier v. Miller*, 10 Hun 435; *Deems v. Baltimore*, 80 Md. 164,

30 Atl. 648, 26 L. R. A. 541, 45 Am. St. 339; *State v. Newton*, 45 N. J. L. 469; *Williams v. Rivenburg* (N. Y. App. Div.), 129 N. Y. Supp. 473.

² *Ex parte Hayden*, 147 Cal. 649, 82 Pac. 315, 1 L. R. A. (N. S.) 184; *Armour Packing Co. v. Snyder*, 84 Fed. 136.

³ *North American Storage Co. v. Chicago*, 211 U. S. 306, 29 Sup. Ct. 101, 53 L. Ed. —.

§ 45. Revocation of Permit to Sell Milk—Notice.

A statute in force in New York City provided that "No milk shall be received, held, kept, offered for sale, or delivered, in the city of New York without a permit, in writing, from the Board of Health, and subject to the conditions thereof." Under this statute it was held that the Board of Health had power to revoke permits to sell milk, notwithstanding no ordinance had been adopted by the board authorizing such revocation.¹ The permit contained a clause that it was "revocable at the pleasure of the Board" of Health. It was contended that the board could not revoke the permit, and the only recourse was to have the person to whom it was issued fined for selling impure milk, when it was sought to revoke his license for that reason. To this the court answered: "The sole authority that the health board would have, if this contention was correct, would be to prosecute the person selling the poisonous article in the shape of milk, fine him, and in the meantime such person could go on poisoning the people under a permit or license from the health authorities, a proposition which is so unreasonable that a mere statement is sufficient to refute it. There is nothing in either the Penal Code or the charter that makes such a permit irrevocable. The permit itself provides that it is revocable at the pleasure of the board, and the plaintiff accepted it with that condition. There is nothing unreasonable in this condition; and, irrespective of the general power of the board of health to revoke a permit which is being abused and under which the person accepting it and using it is persistently violating the law, it is certainly not an unreasonable condition to insert into such a permit a provision that it is revocable by the board that issues it. To hold that such a permit once granted is irrevocable would be to totally defeat the object of the statute in requiring such a permit before a person should engage in the business of supplying to the inhabitants of a city food."²

¹ Metropolitan Milk & Cream Co. v. New York, 113 N. Y. App. Div. 377, 98 N. Y. Supp. 894; affirmed

without an opinion, 186 N. Y. 533, 78 N. E. 1107.

² See also State v. Milwaukee, 140 Wis. 38, 121 N. W. 658.

§ 46. Revocation of Permit to Sell Milk Without Notice Given.—Remedy by Mandamus.

A statute relating to New York City provided that "No milk shall be received, held, kept, offered for sale, or delivered, in the city of New York without a permit, in writing, from the Board of Health, and subject to the conditions thereof." In issuing a permit under this section the Board of Health inserted a provision in it that it was "revocable at the pleasure of the Board." This was held to be a valid provision.¹ The board revoked six permits, having this clause in them, without notice to the licensee; and it was denied that its action was illegal. The revocation was made because the licensee had sold impure milk. The licensee contended the revocation was void because it destroyed a large business which he had for years been building up, and that such a business was property which could not be taken from him without due process of law. "But the good will of his business," said the court, "so established, must not be confounded with the permits granted to him to engage in that business. He was never licensed to sell impure and adulterated milk, and, after he had obtained his permit to sell, and undertook the securing of customers, he knew that he was engaged in a business which must be conducted under the supervision of the board of health of the city subject to the police powers of the State, and that such permits were subject to revocation. He knew that the permits contained no contract between the State or the board of health and himself, giving him any vested right to continue the business, and that it would become the duty of the board to revoke his license in case he violated the statute on the conditions under which it was granted. Milk is an article of food extensively used by our inhabitants, and is chiefly relied upon to support the lives of infant children. If impure and adulterated, or polluted with germs or infectious diseases, its use becomes highly dangerous, and the health and welfare of the

¹ Metropolitan Milk & Cream Co. without an opinion, 186 N. Y. 533, v. New York, 113 N. Y. App. Div. 78 N. E. 1107. 377, 98 N. Y. Supp. 894; affirmed

public demand speedy, and, in some cases, instant prevention of its distribution to the people. While it is the duty of the board of health to watch and, through its inspectors, detect violations of the statute and the conditions imposed by it, it has been given no judicial power to hear, try and determine such violations, but must act upon the information obtained by it through its own channels of inquiry."² The court then discusses the nature of a license, holding that it is not a contract but a mere permission, making this quotation: "Licenses to sell liquors are not contracts between the State and the persons licensed, giving the latter vested rights, protected on general principles and by the Constitution of the United States against subsequent legislation; nor are they property in any legal or constitutional sense. They have neither the quality of a contract, nor of property, but are merely temporary permits to do what otherwise would be an offense against a general law."³ The court then continues as follows: "The powers of the members of the board of health being administrative merely, they can issue or revoke permits to sell milk in the exercise of their best judgment, upon or without notice based upon such information as they may obtain through their own agencies; and their action is not subject to review either by appeal or certiorari.⁴ If, however, their action is arbitrary, tyrannical and unreasonable, or is based upon false information, the relator may have a remedy through mandamus to right the wrong which he has suffered. If the relator can show that he and

² The court reviews at some length *Crowley v. Christensen*, 137 U. S. 86, 11 Sup. Ct. 13, 34 L. Ed. 620; *Dent v. West Virginia*, 129 U. S. 114, 9 Sup. Ct. 231, 32 L. Ed. 623; *Metropolitan Board v. Barrie*, 34 N. Y. 667; *Metropolitan Board v. Heister*, 37 N. Y. 661; *People v. Board of Health*, 140 N. Y. 1, 35 N. E. 320, 23 L. R. A. 481, 37 Am. St. 522, distinguishes *In re Leyman*, 160 N. Y. 96, 54 N. E. 57, and cites *Youngblood v. Sexton*, 32

Mich. 406, 20 Am. Rep. 654; *Commonwealth v. Kinsley*, 133 Mass. 578; *Voight v. Excise Commrs.*, 59 N. J. L. 358, 36 Atl. 686, 37 L. R. A. 292.

³ *Metropolitan Board v. Barrie*, 34 N. Y. 667.

⁴ Citing *Childs v. Bemus*, 17 R. I. 230, 21 Atl. 539, 12 L. R. A. 57; *State v. Doyle*, 40 Wis. 230; *Walbee v. Reno*, 27 Nev. 71, 73 Pac. 528, 103 Am. St. 747, 63 L. R. A. 337.

those acting for him have not been convicted of violating the statute and the conditions imposed in the granting of the permits, and that, consequently, he is a fit and proper person to engage in the sale and distribution of milk among the inhabitants of the city, then he would be entitled to the relief asked for. But if he desired to submit such evidence, he should have asked for an alternative, rather than a peremptory writ. If, however, the charge of the board is true that he has been convicted of the offense charged the number of times stated, the conclusion is irresistible that he was an improper person to be intrusted with the permit of the city to dispense to the inhabitants of the city a food product that was liable, if adulterated, to endanger the health of the people.'"⁵

There are a number of cases which support this case on the power of a board of health to revoke a license or permit without first giving notice to the licensee. If a statute provides for notice and hearing, then, of course, notice must be given in order to sustain the validity of the proceedings. But if it is expressly provided that no notice is necessary,

⁵ *People v. Health Department*, 189 N. Y. 187, 82 N. E. 187, 13 L. R. A. (N. S.) 894. The court discusses at length the question whether or not the members of the board of health are judicial officers, and reaches the conclusion that they are not.

"There is no provision for a hearing before the board on the part of any person who is charged with maintaining a nuisance upon his premises. The right to such a hearing is not expressly given, and cannot be implied from any language found in either Act, or from the nature of the subject dealt with in the acts. Boards of health and other like boards act summarily, and it has not been usual

anywhere to require them to give a hearing to any person before they can exercise their jurisdiction for the public welfare. The public health might suffer or be imperiled if their action could be delayed until a protracted hearing could be brought to a determination. There is no provision in the acts for calling or swearing witnesses, and there is no general law giving them power to do so." It was consequently held that the determination of the board of health as to the existence of a nuisance was not reviewable by certiorari. *People v. Board of Health*, 140 N. Y. 1, 35 N. E. 320, 37 Am. St. 522, 23 L. R. A. 481.

the licensee accepts the license bound by and subject to this condition.⁶

In a number of instances where the statute was silent upon the question of notice, the revocation of a license has been upheld;⁷ and in other instances notice has been held necessary.⁸

§ 47. Destruction of Unwholesome Food Without Notice or Hearing—Right of Action for Value of Food.

Not only may unwholesome or impure food be destroyed by the State or municipal authorities, but it may be destroyed, if the statute or ordinance so provide, without notice or hearing given to the owner. A provision for a hearing before seizure and condemnation and destruction of food which is unwholesome and unfit for use, is not necessary. A right of action against the party destroying it to recover its value is a sufficient remedy for the owner; and does not change the rule "that some value may remain for certain purposes in food that is unfit for human consumption." "The small value that might remain in the food is a mere incident,

⁶ Commonwealth v. Kinsley, 133 Mass. 578; Sprayberry v. Atlanta, 87 Ga. 120, 13 S. E. 197; Martin v. State, 23 Neb. 371, 36 N. W. 554; affirmed on rehearing in 27 Neb. 325, 43 N. W. 108; Londry's Appeal, 79 Conn. 1, 63 Atl. Rep. 293; State v. Milwaukee, 140 Wis. 38, 121 N. W. 658.

⁷ Wallace v. Reno, 27 Nev. 71, 73 Pac. 523, 103 Am. St. 747, 63 L. R. A. 337; Child v. Bernus, 17 R. I. 230, 21 Atl. 539, 12 L. R. A. 57; Carr v. Augusta, 124 Ga. 116, 52 S. E. 300; Young v. Blaisdell, 138 Mass. 344; State v. Milwaukee, 140 Wis. 38, 121 N. W. 658.

⁸ State v. Rahway, 58 N. J. L. 578, 34 Atl. 5; Gaertner v. Fond du Lac, 34 Wis. 497; Oshkosh v. State,

59 Wis. 425, 18 N. W. 324 (by statute); People v. Flynn, 110 N. Y. App. Div. 279, 96 N. Y. Supp. 655; affirmed 184 N. Y. 579, 77 N. E. 1194 (license assignable); In re McGinley's license, 32 Pa. Super. Ct. 324; In re Cullinan, 94 N. Y. App. Div. 445, 88 N. Y. Supp. 164 (license in hands of assignee); Plummer v. Commonwealth, 1 Bush 26 (by statute). Notice to one of two joint licensees is notice to both. Commonwealth v. Bearce, 150 Mass. 389, 23 N. E. 99. Notice to person holding the license as collateral (where it is assignable) is not necessary, if notice be given to the licensee. In re Lyman, 26 N. Y. Misc. 300, 56 N. Y. Supp. 1020.

and furnishes no defense to its destruction when it is plainly kept to be sold at some time as food."

"Complainant, however, contends," said the court, "that there was no emergency requiring speedy action for the destruction of the poultry in order to protect the public health from danger resulting from consumption of such poultry. It is said that the food was in cold storage, and that it would continue in the same condition it then was for three months, if properly stored, and that therefore the defendants had ample time in which to give notice to complainant or the owner and have a hearing of the question as to the condition of the poultry, and as the ordinance provided for no hearing, it was void. But we think this is not required. The power of the Legislature to enact laws in relation to the public health being conceded, as it must be, it is to a great extent within the legislative discretion as to whether any hearing need be given before the destruction of unwholesome food which is unfit for human consumption. If a hearing were to be always necessary, even under the circumstances of this case, the question at once arises as to what is to be done with the food in the meantime. Is it to remain with the cold storage company, and, if so, under what security that it will not be removed? To be sure that it will not be removed during the time necessary for the hearing, which frequently might be indefinitely prolonged, some guard probably would have to be placed over the subject matter of investigation, which would involve expense, and might not even then prove effectual. What is the emergency which would render a hearing unnecessary? We think, when the question is one regarding the destruction of food which is not fit for human use, the emergency must be one which would fairly appeal to the reasonable discretion of the Legislature as to the necessity for a prior hearing, and in that case its decision would not be a subject for review by the courts. As the owner of the food or its custodian is amply protected against the party seizing the food, who must, in a subsequent action against him, show as a fact that it was within the statute, we think that due process of law is not denied the owner or

custodian, by the destruction of the food alleged to be unwholesome and unfit for human food, without a preliminary hearing.'"¹

§ 48. Vinegar, Artificially Coloring.

In New York where it is held that the sale of oleomargarine can not be prohibited;¹ and that the sale of milk or butter in which a harmless preservative has been used can not be prevented;² although the manufacture and sale of a product so compounded as to imitate butter may be prohibited;³ and a statute defining what shall be deemed unwholesome or adulterated milk, and prohibiting its sale is valid,⁴ it has been held to be a constitutional exercise of power on the part of the Legislature to prohibit the artificial coloring of vinegar so that the public would not be deceived thereby.⁵ From these several cases these rules have been deduced by the Court of Appeals of that State: "(1) That the Legislature can not forbid or wholly prevent the sale of a wholesome

¹ *North American Cold Storage Co. v. Chicago*, 211 U. S. 706, 29 Sup. Ct. 101, 53 L. Ed. —; citing *Lawton v. Steele*, 162 U. S. 133, 14 Sup. Ct. 499, 38 L. Ed. —, affirming 119 N. Y. 226, 23 N. E. 878, 16 Am. St. 813; *American Print Works v. Lawrence*, 21 N. J. L. 248; *People v. Board*, 140 N. Y. 1, 37 Am. St. 522, 35 N. E. 320, 23 L. R. A. 481; *Salem v. Eastern R. Co.*, 98 Mass. 431, 96 Am. Dec. 650; *Miller v. Horton*, 152 Mass. 540, 26 N. E. 100, 23 Am. St. 850, 10 L. R. A. 116; *Stone v. Heath*, 179 Mass. 385, 60 N. E. 975; *Lowe v. Conroy*, 120 Wis. 151, 97 N. W. 942, 102 Am. St. 983, 66 L. R. A. 907; *Pearson v. Zehr*, 138 Ill. 48, 29 N. E. 854, 32 Am. St. 113; *State v. Main*, 69 Conn. 123, 37 N. E. 80, 36 L. R. A. 623, 61 Am. St. 203; *Gaines v. Waters*, 64

Ark. 609, 44 S. W. 353; *Withams v. Rivenberg*, 129 N. Y. Supp. 473.

A statute authorizing the fish commission to seize and sell summarily fish sold and held without a statutory permit is valid. *Raymond v. Kibbe*, 43 Tex. Civ. App. 209, 95 S. W. 727.

¹ *People v. Marx*, 99 N. Y. 377, 52 Am. Rep. 34, 2 N. E. 29.

² *People v. Biesecker*, 169 N. Y. 53, 61 N. E. 990, 88 Am. St. 534, 57 L. R. A. 178.

³ *People v. Arensberg*, 105 N. Y. 123, 59 Am. Rep. 483, 11 N. E. 277.

⁴ *People v. Kilber*, 106 N. Y. 321, 12 N. E. 795.

⁵ *People v. Girard*, 145 N. Y. 105, 39 N. E. 823, 45 Am. St. 595, affirming 73 Hun 457, 26 N. Y. Supp. 272, 75 Hun 213. 27 N. Y. Supp. 1118.

article of food. (2) That legislation intended and reasonably adapted to prevent an article being manufactured in imitation or semblance of a well-known article in common use, and thus imposing upon consumers or purchasers, is valid. (3) That, in the interest of public health, the Legislature may declare articles of food not complying with a specified standard unwholesome, and forbid their sale." And the court adds: "Though those principles, like most legal principles, are true only within limits, there would not seem much chance of conflict in their practical application, except between the first and last."⁶ So a statute imposing a penalty for the manufacture, marking or sale as cider vinegar of any adulterated vinegar, or any product which is not cider vinegar, was held to prevent cheating and deception, and for the preservation of health, and was valid.⁷ But a statute which defines adulterated vinegar as a vinegar containing any proportion of lead, or which has not an acidity equivalent to the presence of at least four and one-half percent, by weight, of absolute acetic acid, yet declaring that cider vinegar made by a farmer within the State, exclusively from apples grown on his own ground, or their equivalent in cider taken in exchange therefor, shall not be deemed adulterated if it contain two percent solids and sufficient alcohol to develop the required amount of acid, is unconstitutional, because it contains an unlawful discrimination in favor of farmers and purchasers of cider vinegar from them.⁸

⁶ *People v. Biesecker*, 169 N. Y. 53, 61 N. E. 990, 57 L. R. A. 178, 88 Am. St. 534; *People v. Worden Grocer Co.*, 118 Mich. 604, 77 N. W. 315.

⁷ *People v. Niagara Fruit Co.*, 173 N. Y. 629, 66 N. E. 1114; affirming 75 N. Y. App. Div. 11, 75 N. Y. Supp. 805.

⁸ *People v. Windholz*, 92 N. Y. App. Div. 569, 86 N. Y. Supp. 1015. The part invalid, however, was held not to drag down the remaining part of the statute.

This statute is strictly construed, because in derogation of the common law right to have on sale vinegar of any standard the owner pleases, not shown to be detrimental to the public health. *People v. Braested*, 30 N. Y. App. 401, 51 N. Y. Supp. 824.

The Ohio statute preventing the artificial coloring of vinegar is valid. *Weller v. State*, 53 Ohio St. 77, 40 N. E. 1001; *Williams v. McNeal*, 7 Ohio Cir. Ct. Rep. 280. So the Missouri statute, even though

§ 49. Impure Water in the Making of Bread, Prohibiting.

The State may empower a municipality to adopt such ordinances and regulations as shall be necessary or expedient for the protection of health, and to prevent the spread of disease, and to maintain good sanitary conditions in its streets, public places and buildings, and on all private premises, and to prevent the sale of adulterated or decayed food. Under such powers a municipality may prevent the use of unwholesome well water in the making of bread for public distribution and consumption, and, as a means to that end, it may require the filling up of wells on premises where such bread is made. "If bakers, who either do not believe well water to be injurious, or who do not care whether it is injurious or not, have wells upon their premises, they are likely to use it. Such is the actual case of defendant. He has the well, and he uses the water in making his bread. There is no other way of preventing its use so efficient as to suppress the well. Leave the well, and nothing less than the constant presence of a guard would secure any certainty of its nonuse. Fill up the well, and it is very certain that he will not use the water any more. True, he may possibly get equally objectionable water from wells on other premises; but that may be more inconvenient or troublesome than to find a more wholesome water supply. At all events, the filling of the well has a tendency, and is indeed likely, to accomplish the purpose, and is one means appropriate thereto, and without which it certainly could not be surely accomplished. Far from being unwarranted or unnecessary, it is absolutely essential in order to carry out the end designed."¹

§ 50. Baking Powder, Prohibiting Sale of, when Containing Alum.

It is a dispute among experts whether baking powder containing alum is wholesome or unwholesome; and, therefore,

a label be required on it having on it the word "colored." ¹State v. Schlemmer, 42 La. 1166, 8 So. 307, 10 L. R. A. 135.
Earl, 152 Mo. App. 235, 133 S. W. 402.

if the Legislature takes the view that such a powder is unwholesome, and prevents its sale, the courts can not reverse its decision. "How can we say, in view of the contradictory evidence as to the effect on the health of bread made with alum powders, that the Legislature, beyond a reasonable doubt, transcended its constitutional right in prohibiting the use of alum in bread? We are not authorized to do so. . . . It may be that, in the small quantities now used in these alum powders generally, it can not be shown that any particular person has ever lost his health from their use. But that the Legislature deemed their use deleterious can not be denied, and there is no such conclusive evidence to the contrary as to justify this court in holding that this Act, intended for the benefit of the public health, is void. The mere wisdom or unwisdom of the Act is not for us to decide."¹

¹ *State v. Layton*, 160 Mo. 474, 61 S. W. 171, 62 L. R. A. 163, 83 Am. St. 487.

"The evidence shows," said the court, "that the trade in alum baking powders, as a trade, has given entire satisfaction to the people. Alum baking powders are nearly as standard an article as flour or sugar. They are to be found upon the shelves of every grocery store, not only in Missouri, but in the United States. They were first introduced about 1870. In spite of the fiercest competition and most hostile rivalry upon the part of the manufacturers of cream of tartar powders, who, the evidence shows, have made every effort to prejudice the minds of the public by every manner of advertisement, and representations, the trade rapidly expanded, until it has now reached vast proportions. The evidence tended to show that alum baking powder sold in the United States last year [1900] amounted to not

fewer than 120,000,000 pounds, and involved an enormous expenditure in its manufacture and distribution. The defendant's evidence also tended to show that not only was it a particular can of baking powder, known as "Layton's Health Food," for the sale of which he was prosecuted, but also all alum baking powders in general are, and always have been, healthful and wholesome adjuncts in the preparation of human food. The evidence tends to show that no one had either heard or had known of a single case where the health of a single human being had been injured or had been supposed to have been injured by the use of alum baking powder in the preparation of food, and that the trade in alum baking powder, as a trade prior to the passage of this law, was an honest and lawful business in a generally harmless and useful preparation, and as an adjunct in the cooking of food. The manufacturers and

An early statute of Parliament² absolutely forbade the use of alum in the making of bread. And, irrespective of the statute, it was held indictable to use it in large quantities. Such an act is a common law offense.³

So a statute which requires baking powder to be so labeled as to show the use of alum in it, if such is the case, is valid,⁴ even though it does not require baking powder containing no alum to be labeled.⁵

§ 51. Patented Food.

Many articles of food have been patented, so as to secure to the patentee the exclusive right to manufacture it; and efforts have been made to sell such food notwithstanding it was such food as a State statute forbade the sale thereof. But such efforts have been unavailing. "The fact that complainants produced *Ariosa* under a process protected by letters patent of the United States does not prevent it from coming within the operation of laws passed in the exercise of the police power of the State. The enactment of laws for the protection of health and to prevent imposition in the sale of food products is within this power, and the fact that the process by which it is made is protected by a patent, while it may prevent others from using it during the life of the

sellers of both such powders—cream of tartar and alum—have been engaged in competition with each other in furnishing to the people, from bicarbonate of soda, a leavening agent for cooking bread, cake, etc. They differ only in the non-essential manner of freeing the gas. That the trade in cream of tartar powder has been practically monopolized by the Royal Baking Powder Company, which controls the cream of tartar market."

² 37 Geo. III, Chap. 98, § 21.

³ *Rex v. Dixon*, 3 M. & S. 11, 4

Cowp. 12, 15 R. R. 381. In this case a baker was convicted who supplied children at an asylum with bread, into which his servants, to his knowledge, had introduced alum. See also *Regina v. Stevens* on 3 F. & F. 106, and *Burnby v. Bollet*, 16 M. & W. 644, 17 L. J. Exch. 190, 11 Jur. (O. S.) 827.

⁴ *Stolz v. Thompson*, 44 Minn. 271, 46 N. W. 410; *State v. Sherod*, 89 Minn. 446, 83 N. W. 417, 50 L. R. A. 660.

⁵ *Stolz v. Thompson*, *supra*.

patent, does not deprive the State of this power of regulation for the general good."¹

§ 52. Colored Netting Over Fruit or Vegetables.

The city of Chicago prohibited the use of a colored netting to cover any box, basket, or any other package or parcel of fruit, berries or vegetables of any kind; and the ordinance was held invalid, because it was vexatious and unreasonable interference with and restriction upon the rights of dealers in fruits and vegetables. "It was shown," said the court, "and is a matter of common knowledge, that much fruit is shipped and sold wrapped up in tissue paper and in tinfoil, and in packages and baskets covered with wood, all of which material effectually conceals the 'true color and quality' of the fruit until removed. It would be as reasonable to prohibit the one as the other. Fruit dealers would be subject to unjust and offensive discrimination by the enforcement of such an ordinance. Being unreasonable and oppressive in character, the ordinance is void."¹

§ 53. Restricting Sale of Fresh Pork During Summer.

Under a power "to prevent or regulate the carrying on of any trade, business or vocation of a tendency dangerous to morals, health or safety, or calculated to promote dishonesty or crime," a municipality can not adopt an ordinance forbidding the sale of fresh pork during the warm season of the year, or between June 1 and October 1. Such an ordinance is unreasonable and void, since, it is said, it violates the inalienable right of man to procure food. "Fresh pork is an article of food for general consumption," said the court, "and when sound and free from disease is useful and nutritious. Like all other food, it may become unwholesome when eaten to excess. The quantity eaten, under ordinary circumstances, produces the sickness when it proves unwhole-

¹ *Arbuckle v. Blackburn*, 51 C. C. A. 122, 113 Fed. 616, 65 L. R. A. 364.

¹ *Frost v. Chicago*, 178 Ill. 250, 52 N. E. 869, 49 L. R. A. 657, 69 Am. St. 301.

some. Any food is calculated to produce that effect when eaten in the same manner. The mere sale of it is not detrimental to the public health. The fact that individuals may be made sick by it when imprudently eaten does not justify a city council prohibiting the sale of it. For the same reason it could prohibit the sale of any or all other food. The most delicious food—that which is most liable to be eaten to excess—would be subject to interdiction. If it be conceded that the city council may prohibit the sale of any article of food, the wrongful use of which will or may injure the health of the consumer, then they can prescribe what the citizens of that city shall eat by prohibiting the sale of all other food. The Legislature or any of its creatures has no such power. The exercise of such power, we have seen, would be a violation of the inalienable right of man to procure healthy and nutritious food, by which life may be preserved and enjoyed. It would be an interference with the liberty of the citizen, which is not necessary to the protection of others or the public health,—would be an invasion of his personal rights.”¹

§ 54. Requiring Fresh Meats to be Sold in Markets.

A municipality has power to forbid the sale of fresh meats elsewhere than at market houses established by it where its charter empowers it to establish market houses, designate, control and regulate market places, and regulate the vending of fresh meats; and the fact that the city has licensed a person to keep a private meat market for several years does not compel the municipality to continue granting a license,

¹ *Helena v. Dwyer*, 64 Ark. 424, 42 S. W. 1071, 39 L. R. A. 266, 62 Am. St. 206. The court quotes at length Professor Tiedeman's work on Limitations of Police Power, pp. 294, 295.

A statute may prevent the sale of the meat of calves slaughtered before they are four weeks old.

People v. Dennis, — N. Y. —, 114 N. Y. Supp. 7; *People v. Jackson*, 36 N. Y. Misc. Rep. 282, 73 N. Y. Supp. 461; *Williams v. Rivenburg*, 129 N. Y. Supp. 473. So one requiring the meat of calves to be tagged with the owner's name, and address. *People v. Bishopp*, 44 N. Y. Misc. Rep. 12, 89 N. Y. Supp. 709.

or to prohibit keeping a market within the district where it is situated. Such a person is not deprived of his property without due process of law. The denial of the privilege to sell meats in a municipality except at certain places is not void as in restraint of trade. "Such a power is most necessary for the protection of the health of a city, and has often been recognized."¹

§ 55. State Prohibiting Importation of Food—Interstate Commerce.

A State can not exclude from its markets pure food from other States. Thus the State of Minnesota adopted a statute the effect of which was to exclude from the markets all fresh beef, veal, mutton, lamb or pork, in whatever form, and although entirely sound, healthy and fit for human food, taken from animals slaughtered in other States. This statute tended to restrict the slaughtering of animals whose meat was to be sold in that State, to those engaged in such business in Minnesota. "If the object of the statute," said the Supreme Court of the United States, "had been to deny altogether to the citizens of other States the privilege of selling, within the limits of Minnesota, for human food, any fresh beef, veal, mutton, lamb or pork, from animals slaughtered outside of the State, and to compel the people of Minnesota, wishing to buy such meats, either to purchase those taken from animals inspected and slaughtered in the State, or to incur the cost of purchasing them, when desired for their own domestic use, at points beyond the State, the object is

¹ *Newson v. Galveston*, 76 Tex. 559, 13 S. W. 368, 7 L. R. A. 797; *Buffalo v. Webster*, 10 Wend. 100; *Buch v. Seabury*, 8 Johns. 418; *Winnboro v. Smart*, 11 Rich. L. (S. C.) 552; *Bowling Green v. Carson*, 10 Bush 65; *New Orleans v. Stafford*, 27 La. Ann. 417, 21 Am. Rep. 563; *St. Louis v. Weber*, 44 Mo. 549; *Wartman v. Philadelphia*, 33 Pa. 209; *Ash v. People*, 11

Mich. 351; *Le Claire v. Davenport*, 13 Iowa 210; *Palestine v. Barnes*, 50 Tex. 538; *Jacksonville v. Ledwith*, 26 Fla. 163, 7 So. 885, 9 L. R. A. 69; *Ex parte Canto*, 21 Tex. App. 61; *State v. Schmidt*, 41 La. Ann. 27, 6 So. 530; *State v. Barth*, 41 La. Ann. 46, 6 So. 531; *State v. Natal*, 41 La. Ann. 887, 6 So. 722; *State v. Sarradat*, 46 La. 700, 15 So. 87, 24 L. R. A. 584.

attained by the Act in question. Our duty to maintain the Constitution will not permit us to shut our eyes to these obvious and necessary results of the Minnesota statute. If this legislation does not make such discrimination against the products of other States in favor of the products and business of Minnesota as interferes with and burdens commerce among the several States, it would be difficult to enact legislation that would have that result."¹ A statute of Virginia, by its necessary operation, prohibited the sale in that state of beef, veal or mutton, although entirely wholesome, if taken from animals slaughtered one hundred miles or over from the place of sale. The court said, in holding the Act unconstitutional: "Undoubtedly, the State may establish regulations for the protection of the people against the sale of unwholesome meats, provided such regulations do not conflict with the powers conferred by the Constitution upon Congress, or infringe rights granted or secured by that instrument. But it may not, under the guise of exerting its police power, or of enacting inspection laws, make discriminations against the products and industries of some of the States in favor of the products and industries of its own or of other States. The owner of the meats here in question, although they were from animals slaughtered in Illinois, had the right, under the Constitution, to compete in the markets of Virginia upon terms of equality with the owners of like meats from animals slaughtered in Virginia or elsewhere within one hundred miles from the place of sale. Any local regulation which, in terms or by necessary operation, denies this equality in the markets of the State is, when applied to the people and products or industries of other States, a direct burden upon commerce among the States, and, therefore, void."²

¹ *Minnesota v. Barber*, 136 U. S. 313, 10 Sup. Ct. 862, 341 L. Ed. 455, affirming 39 Fed. 641; *Railroad Co. v. Husen*, 95 U. S. 465, 24 L. Ed. 527, reversing 60 Mo. 226; *Plumley v. Massachusetts*, 155 U. S. 461, 15 Sup. Ct. 154, 39 L. Ed. 223, affirming 156 Mass. 236, 15

L. R. A. 839, 30 N. E. 1127; *Crossman v. Lurman*, 192 U. S. 189, 24 Sup. Ct. 234, 48 L. Ed. 401, affirming 171 N. Y. 329, 63 N. E. 1097, 98 Am. St. 599.

² *Brimmer v. Rebman*, 138 U. S. 78, 11 Sup. Ct. 213, 34 L. Ed. 862, affirming 41 Fed. 867.

So a statute which required flour brought into a State to be inspected, but did not require inspection of flour ground within the State, was held invalid, on the ground that it was undue discrimination against the products of these States and in favor of the products of the State enacting the statute.³ But it must not be inferred from these remarks and quotations that a State can not protect its inhabitants against fraud and deception in the sale of food products brought from other States as well as from those grown within its own limits, even though the legislation for that purpose indirectly or incidentally affects trade in the products transported from one State to another.⁴ "In conferring upon Congress the regulation of commerce, it was never intended to cut the States off from legislation on all subjects relating to the health, life and safety of their citizens, though the legislation might indirectly affect the commerce of the country. Legislation, in a great variety of ways, may affect commerce and persons engaged in it without constituting a regulation of it within the meaning of the Constitution. . . . And it may be said generally, that the legislation of a State, not directed against commerce or any of its regulations, but relating to the rights, duties and liabilities of citizens, and only directly and remotely affecting the operations of commerce, is of obligatory force upon citizens within its territorial jurisdiction, whether on land or water, or engaged in commerce, foreign or interstate, or in any other pursuit."⁵

A State can not prohibit the sale of oleomargarine in original packages where it has been imported from another State,⁶ unless a Federal statute grant it permission so to do.⁷

³Voight v. Wight, 141 U. S. 62, 11 Sup. Ct. 855, 35 Fed. 638.

⁴Plumley v. Massachusetts, 155 U. S. 461, 15 Sup. Ct. 154, 39 L. Ed. 223, affirming 156 Mass. 236, 30 N. E. 1127, 15 L. R. A. 839.

⁵Sherlock v. Alling, 93 U. S. 99, 23 L. Ed. 819, affirming 44 Ind. 184.

⁶In re Gooch, 42 Fed. 276, 10 L. R. A. 830; Leisy v. Hardin, 135 U.

S. 100, 10 Sup. Ct. 681, 34 L. Ed. 128, reversing 78 Iowa 286, 43 N. W. 188; *In re Brundage*, 96 Fed. 963.

⁷*In re Raher*, 140 U. S. 545, 11 Sup. Ct. 865, 35 L. Ed. 572, reversing 43 Fed. 556; *In re Spickler*, 43 Fed. 653, 10 L. R. A. 451; *In re Van Vliet*, 43 Fed. 761; *State v. Fraser*, 1 N. D. 425, 48 N. W. 343.

§ 56. Statute Excluding Importation of Oleomargarine from One State Into Another State.

Oleomargarine has been so long recognized as an article of food and commerce, and has been recognized as such by Congress in its Act of 1886, that it can not now be wholly excluded from importation into a State from another State where it is manufactured. But that does not mean that the State into which it is introduced may not so regulate its introduction so as to insure its purity. A State can not prohibit the introduction from another State and sale of oleomargarine within its boundaries in the original package, unless Congress gives its consent.¹

Thus the State of Pennsylvania provided that no person, firm or corporate body should manufacture out of any oleaginous substance or any compound of it, other than that produced from unadulterated milk or of cream from the same, any article designed to take the place of butter or cheese produced from pure unadulterated milk, or cream from the same, or of any imitation or unadulterated butter or cheese, nor should sell or offer for sale, or have in his, her or their possession with intent to sell it as an article of food. This, of course, applied to the sale and possession of original packages of oleomargarine imported into a State and held for sale. The Supreme Court of that State held this statute valid;² but on appeal to the Supreme Court of the United States the statute was held to be invalid. The court first inquires whether oleomargarine is an article of commerce, and finds that it is. It then discusses its composition,³ and then uses the following language:

¹ Congress has given its consent that a State may prohibit the sale of intoxicating liquors in the original package when brought from another State, and this act on its part has been held constitutional. 26 U. S. Stat. at Large, 313 Ch. 728; *In re Raher*, 140 U. S. 545, 11 Sup. Ct. 865, 35 L. E. 572, reversing 43 Fed. 556; *Plumley v. Massachusetts*, 155 U. S. 461, 15

Sup. Ct. 154, 39 L. Ed. 223; *Emert v. Missouri*, 156 U. S. 296, 15 Sup. Ct. 367, 39 L. Ed. 223.

² *Commonwealth v. Paul*, 170 Pa. 284, 33 Atl. 85, 50 Am. St. 776.

³ Citing the *Encyclopedia Britannica*, vol. 17, title "Oleomargarine," *Ex parte Scott*, 66 Fed. 45; *People v. Marx*, 99 N. Y. 381, and Act of Congress of 1886, 24 U. S. Stat. at Large 209.

"We do not think the fact that the article is subject to be adulterated by dishonest persons, in the course of its manufacture, with other substances, which it is claimed may in some instances become deleterious to health, creates the right in any State through its Legislature to forbid the introduction of the unadulterated article into the State. The fact that the article is liable to adulteration in the course of manufacture, and that the articles with which it may be mixed may possibly and under some circumstances be deleterious to the health of those who consume it, is known to us by means of various references to the subject in books and encyclopedias, but there was no affirmative evidence offered on the trial to prove the fact. From these sources of information it may be admitted that oleomargarine in the course of its manufacture may sometimes be adulterated by dishonest manufacturers with articles that possibly may become injurious to health. Conceding the fact, we yet deny the right of a State to absolutely prohibit the introduction within its borders of an article of commerce, which is not adulterated, and which in its pure state is healthful, simply because such an article in the course of its manufacture may be adulterated by dishonest manufacturers for purposes of fraud or illegal gains. The bad article may be prohibited, but not the pure and healthy one.

In the execution of its police powers we admit the right of the State to enact such legislation as it may deem proper, even in regard to articles of interstate commerce, for the purpose of preventing fraud or deception in the sale of any commodity and to the extent that it may be fairly necessary to prevent the introduction or sale of an adulterated article within the limits of the State. But in carrying out its purposes the State can not absolutely prohibit the introduction within the State of an article of commerce like pure oleomargarine. It has ceased to be what counsel for the Commonwealth has termed it—a newly discovered food product. An article that has been openly manufactured for nearly a quarter of a century, where the ingredients of the pure article are perfectly well known, and have been known for a

number of years, and where the general process of manufacture has been known for an equal period, can not truthfully be said to be a newly discovered product within the proper meaning of the term as here used. The time when a newly discovered article ceases to be such can not always be definitely stated, but all will admit that there does come a period when the article can not so be described. In this particular case we have no difficulty in holding that oleomargarine has so far ceased to be a newly discovered article as that its nature, mode of manufacture, ingredients, and effect upon the health are and have been for many years as well known as almost any article of food in daily use. Therefore, if we admit that a newly discovered article of food might be wholly prohibited from being introduced within the limits of a State, while its properties, whether healthful or not, were still unknown, or in regard to which there might still be doubt, yet this is not the case with oleomargarine. If properly and honestly manufactured, it is conceded to be a healthful and nutritious article of food. The fact that it may be adulterated does not afford a foundation to absolutely prohibit its introduction into the State. Although the adulterated article may possibly in some cases be injurious to the health of the public, yet that does not furnish a justification for an absolute prohibition. A law which does thus prohibit the introduction of an article like oleomargarine within the State is not a law which regulates or restricts the sale of articles deemed injurious to the health of the community, but is one which prevents the introduction of a perfectly healthy commodity merely for the purpose of in that way more easily preventing an adulterated and possibly injurious article from being introduced. We do not think this is a fair exercise of legislative discretion when applied to the article in question."⁴

⁴Schollenberger v. Pennsylvania, 171 U. S. 1, 18 Sup. Ct. 757, 43 L. Ed. 49, reversing Commonwealth v. Paul, 170 Pa. 284, 33 Atl. 85, 30 L. R. A. 356, reversing 9 Pa. Co.

Ct. Rep. 196, 10 Pa. Co. Ct. Rep. 332, and distinguishing Commonwealth v. Schollenberger, 156 Pa. 201, 27 Atl. 30, 22 L. R. A. 155, 4 Inters. Com. Rep. 488. To same

§ 57. Interstate Commerce, Prohibiting Sale of Adulterated Food and Drugs—Original Packages.

A statute which prohibits the sale of adulterated food and drugs, is not repugnant to the commerce clause of the Federal Constitution, but is a valid exercise of the police power of the State. The State may prohibit the sale of such food or drugs, although it be offered for sale in the original package. It never was the intention of the interstate commerce clause that under its shield food and drugs detrimental to the health of the inhabitants of a State might be introduced and sold, and thus escape the provisions of State laws prohibiting the sale of like food and drugs which had been produced within the State.¹ "And yet it is supposed that the owners of a compound which has been put in a condition to cheat the public into believing that it is a particular food

effect *Collins v. New Hampshire*, 171 U. S. 30, 18 Sup. Ct. 768, 43 L. Ed. 60, reversing 67 N. H. 540, 42 Atl. 51; *People v. Simpson-Crawford Co.*, 62 N. Y. Supp. 240, 114 N. Y. Supp. 945; *In re Scheitlin*, 99 Fed. 272; *McAllister v. State*, 94 Md. 290, 50 Atl. 1046; *Waterbury v. Egan*, 3 N. Y. Misc. Rep. 355, 23 N. Y. Supp. 115; *In re Worthen*, 58 Fed. 467; *State v. Gooch*, 44 Fed. 276; *In re McAllister*, 51 Fed. 282; *In re Minor*, 69 Fed. 233; *Ex parte Scott*, 66 Fed. 45; *United States v. Sixty-five Casks*, 170 Fed. 449 (A shipment in carload lots, the cask being the "original package.").

A statute making it punishable to keep with intent to ship out of the state for food purposes the flesh of a calf which is less than four weeks old, or weighs less than 50 pounds, dressed weight, when killed, is invalid, as an interfer-

ence with interstate commerce. *State v. Peet*, 80 Vt. 449, 68 Atl. 661; *In re Brundage*, 96 Fed. 963, cannot be regarded as sound.

Article I, § 10 of the Federal Constitution providing that "no state shall, without the consent of Congress lay any import or duty on any imports or exports, except as may be absolutely necessary for executing its inspection laws," applies only to articles imported from foreign countries, or exported to them, and not to articles of interstate commerce. *Red C. Oil Mfg. Co. v. Board*, 172 Fed. 695.

¹ *Plumley v. Massachusetts*, 155 U. S. 461, 15 Sup. Ct. 154, 39 L. Ed. 223, affirming 156 Mass. 236, 30 N. E. 1127, 15 L. R. A. 899; *Crossman v. Lurman*, 192 U. S. 189, 24 Sup. Ct. 234, 48 L. Ed. 401, affirming 171 N. Y. 329, 83 N. E. 1097; *Borden's Condensed Milk Co. v. Montclair* (N. J. L.), 80 Atl. 30.

in daily use and eagerly sought by people in every condition of life, is protected by the Constitution in making a sale of it against the will of the State in which it is offered for sale, because of the circumstances that it is an original package, and has become a subject of ordinary traffic. We are unwilling to accept this view. We are of the opinion that it is within the power of the State to exclude from its markets any compound manufactured in another State, which has been artificially colored or adulterated so as to cause it to look like an article of food in general use, and the sale of which may, by reason of such coloration or adulteration, cheat the general public into purchasing that which they may not intend to buy. The Constitution of the United States does not secure to any one the privilege of defrauding the public."² The Act of Congress of 1890,³ prohibiting the importation into the United States of adulterated and unwholesome food is not such action on the part of Congress on the subject as deprives the States of their police power to legislate for the prevention of the sale of articles of food so adulterated as to come within valid prohibitions of their statutes.⁴ The fact that a demand exists for articles of food so adulterated by fraud and deception as to come within the prohibitions of a State statute does not bring the right to deal therein under the interstate commerce of the Federal Constitution so that such dealings can not be controlled by the State in the valid exercise of its police power.⁵

A statute intended to prevent the coloring, coating or polishing of an article of intended food, whereby damage or inferiority is concealed, is not in conflict with the power of Congress to regulate commerce, even if applied to articles sold in the original packages imported from other States.⁶

² *Plumley v. Massachusetts*, 155 U. S. 461, 15 Sup. Ct. 154, 39 L. Ed. 223, quoted in *Crossman v. Lurman*, 192 U. S. 189, 24 Sup. Ct. 234, 48 L. Ed. 401, when discussing the sale of imported impure food, and in affirming 171 N. Y. 329, 83 N. E. 1097.

³ 26 U. S. Stat. at Large 414.

⁴ *Crossman v. Lurman*, 192 U. S. 189, 24 Sup. Ct. 234, 48 L. Ed. 401, affirming 171 N. Y. 329, 83 N. E. 1097.

⁵ *Crossman v. Lurman*, *supra*. This was a sale of colored coffee.

⁶ *Arbuckle v. Blackburn*, 51 C.

§ 58. Forbidding Exportation of Food.

Where a State statute made it a misdemeanor to keep, with intent to ship out of the State for food purposes, the flesh of a calf which was less than four weeks old when killed, or

C. A. 122, 113 Fed. 616, 65 L. R. A. 864; *State v. Rogers*, 95 Me. 94, 49 Atl. 564; *People v. Meyer*, 89 N. Y. App. Div. 185, 85 N. Y. Supp. 834; *In re Scheitlin*, 99 Fed. 272; (*Contra. In re Brundage*, 96 Fed. 963); *Commonwealth v. Van Dyke*, 9 Pa. Dist. Rep. 41; *Commonwealth v. Van Dyke*, 13 Pa. Super. Ct. 484; *Commonwealth v. McCann*, 14 Pa. Super. Ct. 221; *McCann v. Commonwealth*, 198 Pa. 509, 48 Atl. 470; *Armour Packing Co. v. Snyder*, 84 Fed. 136; *Patapasco Guano Co. v. Board*, 171 U. S. 345, 18 Sup. Ct. 757, 43 L. Ed. 191, affirming 53 Fed. 690; *Red C. Oil Mfg. Co. v. Board*, 172 Fed. 695; *Evans v. Chicago & N. W. Ry. Co.*, 109 Minn. 64, 122 N. W. 876; *State v. Peet*, 80 Vt. 449, 68 Atl. 661, 130 Am. St. 998; *In re Brosnahan*, 18 Fed. 62.

Regulations for the protection of the public health are within the police power of the State, and are not an illegal interference with interstate commerce, if they have a real substantial relation to a public object which government can accomplish, and are not arbitrary and unreasonable and beyond the necessities of the case. Consequently an ordinance providing that "no milk shall be sold or offered for sale or distributed in the town of Montclair except from cows in good health, nor unless the cows from which it is obtained have within

one year been examined by a veterinarian whose competency is vouched for by the State Veterinary Association of the state in which the herd is located, and a certificate signed by a veterinarian has been filed with the board of health, stating the number of cows in each herd which are free from disease," providing that the examination must include the tuberculin test, and charts showing the reaction of each individual cow must be filed with the board, and also providing that all cows which react must be removed from the premises at once if the sale of milk is continued, and no cows can be added to a herd until certificate of satisfactory tuberculin tests of the cows have also been filed with the board, and still further providing that "no cream shall be sold, exposed for sale or delivered within the town of Montclair, unless it be produced and handled in accordance with the regulations," above set forth for the production and handling of milk, is valid, although it has the effect to prohibit the introduction of milk into Montclair from another state, where the dairymen producing the milk refuse or fail to comply with the provisions of these requirements. *Borden's Condensed Milk Co. v. Montclair* (N. J. L.), 80 Atl. 30.

A vendor of milk who invokes

weighed less than fifty pounds dressed, and also made it an offense to have the flesh of such calves "with intent to sell for food purposes," it was held that an indictment based upon this statute charging the accused with having had such meat in his possession with intent to ship it out of the State for food purposes was bad; because the Federal Act excludes a State from making any regulation upon the subject affecting such meat when it was a subject of interstate commerce; but that part of the indictment based upon a section of the statute making it an offense to have in possession the meat of such calves with intent to sell it for food purposes was valid, because that part of the statute must be construed to relate to sales within the State which would be within the power of the Legislature to regulate. Under the Federal Act the Secretary of Agriculture had issued regulations requiring carcasses of calves under three weeks of age to be condemned.¹ But where one section of a statute prohibited the sale as an article of food of veal from a calf under four weeks old when killed; and another section required all veal shipped to have annexed to it a tag stating the name of the person who raised the calf, the name of the shipper, the points of shipping, and the destination and age of the calf, it was held that the latter section was evidently passed to secure the enforcement of the provisions of the former section, and was clearly, as was such former section, within the police power of the State.²

§ 59. Sale of Adulterated Articles to Citizens of Another State—Interstate Commerce.

A statute which defines what constitutes adulterated food,

the interstate commerce clause as a defense must clearly show that his acts come within its provisions. *St. Louis v. Niehaus* (Mo.), 139 S. W. 450.

¹*State v. Peet*, 80 Vt. 449, 68 Atl. 661, 130 Am. St. 998, 14 L. R. A. (N. S.) 678.

²*People v. Bishopp*, 106 N. Y. App. Div. 266, 94 N. Y. Supp. 773, affirming 44 N. Y. Misc. Rep. 12, 89 N. Y. Supp. 709; *People v. Dennis* (N. Y. App.), 114 N. Y. Supp. 7; *People v. Jackson*, 36 N. Y. Misc. Rep. 282, 73 N. Y. Supp. 461.

if otherwise constitutional, must be held invalid on the ground that it is a regulation of interstate commerce and prevents its manufacture and sale to the inhabitants of other States.¹

§ 60. Inspection of Foods and Drugs.

A State has full power to provide for inspection of foods and drugs, in order to secure their purity. This has been elsewhere discussed sufficiently under other heads not to require here the citation of authorities. It may provide for the inspection of foods imported into the State, as well as animals.¹ Such a statute must, however, operate alike upon imported as well as upon exported and domestic articles.²

Thus a statute requiring all beer manufactured in the State to be inspected is valid; notwithstanding the doctrine that an inspection law can not be legitimately employed to yield a revenue beyond the cost of inspection. Such a doctrine has no application to such a law, since the manufacture and sale of beer may be prohibited.³

The fee exacted for inspection can not be held invalid, unless so unreasonable and disproportionate to the service rendered as to impeach the good faith of the law.⁴ A statute which empowers a municipality "to do all acts and make regulations which may be necessary or expedient for the promotion of health or the suppression of disease," confers power upon it to establish a public slaughter house for the purpose of securing proper inspection of fresh meats.⁵

§ 61. Inspection Laws Preventing Importation.

While a State may enact laws for the inspection of foods,

¹ *People v. Niagara Fruit Co.*, 173 N. Y. 629, 66 N. E. 1114, affirming 75 N. Y. App. Div. 11, 77 N. Y. Supp. 805.

² *Evans v. Chicago & N. W. Ry. Co.*, 109 Minn. 64, 122 N. W. 876; *State v. Bixman*, 162 Mo. 1, 62 S. W. 828.

³ *Patapsco Guano Co. v. Board*,

171 U. S. 345, 18 Sup. Ct. 862, 43 L. Ed. 191, affirming 53 Fed. 690.

⁴ *State v. Bixman*, 162 Mo. 1, 62 S. W. 828.

⁵ *Red C. Oil Mfg. Co. v. Board*, 172 Fed. 695.

⁶ *Huesing v. Rock Island*, 128 Ill. 465, 21 N. E. 558, 15 Am. St. 129, reversing 25 Ill. App. 600.

it cannot enact such severe laws as will amount to a prohibition of importation of foods from another State. "The general rule to be deduced from the decisions of this court," said the Supreme Court of the United States, "is that a lawful article of commerce can not wholly be excluded from importation into a State from another State where it was manufactured or grown. A State has power to regulate the introduction of any article, including a food product, so as to insure purity of the article imported, but such police power does not include the total exclusion even of an article of food."¹ If the inspection law relating to an article of food be not a rightful exercise of the police power of the State so that the inspection prescribed is of such a character, or if it be burdened with such conditions as to wholly prevent the introduction of the sound article from other States, it is invalid.² "Whatever our individual views may be," said the Supreme Court of the United States in a case involving intoxicating liquors, "as to the deleterious or dangerous qualities of particular articles, we can not hold that any articles which Congress recognizes as subjects of interstate commerce are not such, or whatever are thus recognized can be controlled by State laws amounting to regulations while they retain that character, although, at the same time, if directly dangerous in themselves, the State may take appropriate measures to guard against injury before it obtains complete jurisdiction over them. To concede to a State power to exclude, directly or indirectly, articles so situated, without Congressional permission, is to concede to a majority of the people of a State, represented in the State Legislature, the power to regulate commercial intercourse between the States by determining what shall be its subjects, when that power was distinctly granted to be exercised by the people of the United

¹ *Schollenberger v. Pennsylvania*, 171 U. S. 1, 18 Sup. Ct. 757, 43 L. Ed. 49, reversing 170 Pa. 284, 33 Atl. 85, 30 L. R. A. 396.

² *Minnesota v. Barber*, 136 U. S. 313, 10 Sup. Ct. 862, 34 L. Ed.

455, affirming 39 Fed. 641; *Brimmer v. Rebman*, 138 U. S. 78, 11 Sup. Ct. 213, 34 L. Ed. 862, affirming 43 Fed. 638; *Scott v. Donald*, 165 U. S. 58, 17 Sup. Ct. 265, 41 L. Ed. 632.

States represented in Congress, and its provision by the latter was considered essential to that more perfect union which the Constitution was adopted to create."²

§ 62. Discrimination in the Inspection of Domestic and Imported Food.

In Georgia, an ordinance of the city of Augusta created a packing house inspector to inspect all meats shipped into the city, or brought from outside the county in which it was situated and offered for food. It was made his duty to visit all packing houses daily and all other places of importers of meat stuffs not otherwise provided for, and secure from them their bills of lading, for the purpose of determining whether or not the shipments had made proper time, and whether the cars containing the meat stuff had been properly iced during transit. It was made his duty to open the cars, and, by proper inspection, ascertain whether the meat stuffs contained in the cars were in a healthful condition for sale; and "all meats and other foodstuffs found not to be in a healthful condition" were to be condemned and ordered out of the city as condemned meat at the expense of the packer. The inspector was allowed to charge the following fees: "Each beef carcass 20 cents, each calf carcass 10 cents, each sheep carcass 10 cents, each hog carcass 10 cents, all cuts of fresh meat, sausage, poultry, game, and fish, per hundred-weight, 10 cents." The ordinance imposed no such charge on others engaged in like business. It was held to be an unlawful interference with interstate commerce, discriminatory in character, and invalid. "Discrimination against products of other States," said the court, "can not be allowed, nor can a municipal ordinance undertake to regulate interstate commerce. Inspection laws must be confined to their legitimate purpose, and municipal ordinances must be reasonable. In the ordinance under consideration a special packing house inspector was created, and it was provided

² *Leisy v. Hardin*, 135 U. S. 100, 465, 24 L. E. —; *Red C. Oil Mfg. Co. v. Board*, 172 Fed. 695.
10 Sup. Ct. 681, 34 L. Ed. 128; *Railroad Company v. Husen*, 95 U. S.

that he should visit all packing houses daily, and all other places of importers of meat stuff not otherwise provided for, and secure from them their bills of lading, 'for the purpose of determining whether or not such shipments have made proper time, and whether the cars containing said meat stuff have been properly iced during transit.' These are matters of regulation of commerce, and the municipal authorities had no power to deal with them. Fees were also provided to be paid for the inspection of articles thus received by packing houses or similar establishments to which meat was imported from without the State, but no similar fees or charges were provided as to other establishments selling meat. As to the administration of the ordinance, while it was denied that any discrimination was intended, it was admitted that the defendants considered that the abattoir just outside the city line, and inspected thoroughly by Federal inspection before slaughtering, occupied a much different position from a packer who had his product shipped thousands of miles after it was inspected. This ordinance before us exceeds the authority of the municipality, undertakes to deal with regulations of interstate commerce, is discriminatory in character, and void."¹

§ 63. State Inspection Law in Contravention of Federal Meat Inspection Law of 1906.

The Act of Congress of 1906 for the inspection of meat¹ in so far as it relates to the inspection of animals slaughtered and meats prepared by packing houses for interstate or foreign commerce, does not entirely exclude the States, or municipalities under their authority, from enacting proper inspection laws to prevent meat which has become unfit for

¹ *Armour & Co. v. Augusta*, 134 Ga. 178, 67 S. E. 417, 27 L. R. A. (N. S.) 677. See also *Evans v. Chicago, etc. R. Co.*, 109 Minn. 64, 122 N. W. 876, 26 L. R. A. (N. S.) 279, note.

A less stringent law was held

unconstitutional in *Louisiana. Carter v. Green*, 127 La. 490, 53 So. 729, 31 L. R. A. (N. S.) 1055.

¹ 34 U. S. Stat. at Large 669, 674. See Appendix for this statute.

food by reason of decay or similar cause from being distributed or sold, to the injury of the health of its citizens. "It will not be presumed," said the court, "that Congress intended to abrogate the power of the State to have meat or food inspected for the protection of its citizens, except in a plain case, certainly it will not be assumed that they intended to delegate such power to an administrative officer, or a bureau, or a meat inspector. An examination of that portion of the Act of Congress of 1906 referring to the Bureau of Animal Industry will show that it dealt principally with the inspection of cattle, sheep, swine and goats before being slaughtered, of carcasses or parts of carcasses after being slaughtered, and of meat products at packing houses and similar establishments where they were prepared for interstate commerce. Persons, firms and corporations were prohibited from transporting or offering for transportation, and carriers of interstate or foreign commerce were prohibited from transporting or receiving for transportation in interstate or foreign commerce, any carcass, meat or meat food products thereof which had not been inspected, examined and marked as required by the Act. The Act did not undertake wholly to destroy the right of local inspection by a State or a municipality under its authority after the meat had been shipped to a warehouse or branch agency located in a State other than that where the packing house was, and where it was kept for distribution and sale. It by no means follows because meat has been inspected in Chicago, and found to be in condition suitable for shipment, that, after being shipped into Georgia and there held, it still remains suitable for sale and use as food. The conferring of authority on the Secretary of Agriculture to make rules and regulations necessary for the efficient execution of the Act of Congress did not authorize him to go further and to deny to the States their inherent right of passing legitimate inspection laws. Nor will a regulation by him directing inspectors to notify municipal authorities, and on request to advise with such authorities with a view of preventing the entry into the local market of diseased animal or other prod-

ucts, and providing that the details of any proposed co-operative arrangement must first be submitted to and approved by the Chief of the Bureau of Animal Industry, be treated as an effort to exclude the State or its subordinate municipalities from exacting proper laws. We can not sustain the broad position that States and municipalities are wholly prohibited from enacting inspection laws touching meats slaughtered or prepared in packing houses located in other States.”²

§ 64. Labeling Impure Food.

Since a State may entirely prohibit the sale of impure or unhealthful food, so it may permit the sale of such food, but require it to be so labeled as to indicate to the purchasers that it is impure. Such a regulation clearly falls within a State’s police power to protect the health of its inhabitants. Speaking of an Act which required all fruit packed for shipment to be marked with the locality in which it was grown, and in holding it invalid, it was said: “If it is a question of the shipping of diseased apples, it would be simple enough for the Legislature, and quite within its power, to regulate or prohibit the transportation of such diseased fruit. If it were a question merely of deception in the label, the direct and efficacious method would be for the Legislature to prohibit false labeling.”¹

§ 65. Labeling to Prevent Deception—Baking Powders.

In order to protect the public from deception, there is no doubt that the Legislature has ample power to require labels

² *Armour & Co. v. Augusta*, 134 Ga. 178, 67 S. E. 417, 27 L. R. A. 677. But see *Savage v. Scovel*, 171 Fed. 566.

¹ *Ex parte Hayden*, 147 Cal. 649, 82 Pac. 315, 11 L. R. A. (N. S.) 184, 109 Am. St. 183; *State v. Hammond Packing Co.*, 105 Minn. 359, 117 N. W. 606; *State v. Snow*,

81 Iowa 642, 47 N. W. 777, 11 L. R. A. 355; *Pierce v. State*, 63 Md. 592; *Steiner v. Ray*, 84 Ala. 93, 4 So. 172, 5 Am. St. 332 (fertilizers).

No one can insist upon his right to sell impure food merely because he has placed upon it a label that it is impure. *State v. Earl*, 152 Mo. App. 235, 133 S. W. 402.

to be placed upon packages of goods wherein is specified in detail the ingredients of which it is composed; and if preservatives have been used in it, though they be perfectly harmless, to require that fact and the name of the preservatives to be given. "Doubtless the Legislature could provide . . . that the packages [of butter] should be clearly marked with a label stating such fact [that a particular preservative had been used], and it might require any notice adopted to inform the public of the nature and treatment of the article offered for sale."¹ And it may be remarked that the Federal Pure Food Act requires a label whereon is stated the ingredients of the package; and no one seriously doubts its validity. A State statute requiring a label to be placed on all compounds intended to be used as a baking powder containing the legend: "This baking powder is composed of the following ingredients, and none other," and then the ingredients set out, with the manufacturer's name, is valid. It is no argument that the public will not be benefited by such a requirement; that the purchasers do not know the meaning of the term used on the labels; that it is unjust to cause a manufacturer or dealer in pure powders to submit to such a law, for the purpose of exposing those who make or deal in a harmful article; that if such a law can be imposed against baking powders, without reference to their purity, then pure sugar, pure flour, and other pure staple articles of food may be likewise brought under similar restrictions, and to single out baking powder in such manner is class legislation. "There is nothing in all these objections."² The use of baking powder in compounds has become common; being a compound, the people should know the contents that they may judge of the quality before purchasing, and the people are less easily imposed upon

¹ *People v. Biesecker*, 169 N. Y. 43 Pac. 1047; *State v. Aslesen*, 50 Minn. 5, 52 N. W. 220; *Commonwealth v. Seiler*, 20 Pa. Super. Ct. 260.
 53, 61 N. E. 990, 57 L. R. A. 178, 88 Am. St. 534; *State v. Snow*, 81 Iowa 642, 47 N. W. 777, 11 L. R. A. 355; *State v. Hanson*, 84 Minn. 42, 86 N. W. 768, 54 L. R. A. 468; *Haines v. People*, 7 Colo. App. 467.

² *State v. Sherod*, 80 Minn. 446, 83 N. W. 417, 50 L. R. A. 661, 81 Am. St. 268.

when the contents are made known by a label on the powder offered than by the vendor. "The owner of such property may be legally required, as a matter of proper police regulation for the benefit of the people in general, to sell for what it actually is, from its own merits, and is not entitled, as a matter of constitutional right, to the benefit of any additional market value which he may secure by concealing its character."³ A statute which only requires baking powder containing alum to be labeled, and does not require a label for powder containing no alum is valid, and is not prohibited by class legislation.⁴ So where a statute required any package of lard containing any ingredient except pure fat of healthy swine to be labeled "Compound Lard" in letters one-half inch in length, and plainly exposed to view, and the name and proportion, in pounds and fractions thereof, of each ingredient contained in the compound, it was upheld. "The Act is," it was said, "a mere regulation by which the public may know by inspection of the package the ingredients used in its preparation. If it resemble lard, it is surely no infringement of any right of the grocery-man or dealer to require him to make known to the public, in a proper manner, the constituent parts of the article which he offers for sale."⁵

In an instance of a sale of the meat of a calf under four weeks old when killed, a statute requiring such meat when shipped to be tagged, whereon is stated the name of the person

³ *Stolz v. Thompson*, 44 Minn. 271, 46 N. W. 410.

⁴ *Stolz v. Thompson*, *supra*.

⁵ *State v. Snow*, 81 Iowa 642, 47 N. W. 777, 11 L. R. A. 355.

Speaking of this statute the court said: "If a dealer offers for sale an article intended to be used for lard, he must label it so that the public may not be deceived and defrauded by paying the value of pure lard for a cheaper article. If the dealer will label the article so that the people may know what they

purchase he may deal in it with impunity. This much the law-making power may demand of him without impairing any right of property, or the exercise of any lawful business."

The fact that the legitimate as well as the illegitimate article is required to be tagged does not affect the necessity of reasonableness. *People v. Bishopp*, 106 N. Y. App. Div. 266, 94 N. Y. Supp. 773, affirming 44 N. Y. Misc. Rep. 12, 89 N. Y. Supp. 709.

who raised the calf, the name of the shipper, the points of shipping, and the destination and age of the calf, has been held valid.*

§ 66. Labeling Small Packages Taken from Original Packages.

As the object of the statute requiring labels to contain a statement of the ingredients composing the contents of the packages is to protect the consumer rather than the dealer, it is necessary that the package the consumer receives when he makes a purchase shall be labeled so as to show the several parts of its contents in order to protect him rather than it should be placed merely upon a large package composed of such small packages. The consumer does not see the original large package, and although told that the small package he is purchasing comes from it, yet he may not know that such is the fact, or he may be deceived by an untruthful statement. It is, therefore, the better construction of those statutes requiring labels that the package the consumer purchases must be labeled rather than the original package from which it is taken. "If the domestic dealer were to sell an original package labeled as above to the consumer, such sale would be valid, because the label complies with the law, and notifies the purchaser that the article is not a sausage of meat alone, but a sausage composed of meat and meal." But the court considered that if the original package was composed of many small packages, it being the intention to retail such small packages to would-be consumers, then each small package should be so labeled as to show the ingredients composing it.¹

**People v. Bishopp*, 106 N. Y. App. Div. 266, 94 N. Y. Supp. 773, affirming 44 N. Y. Misc. 12, 89 N. Y. Supp. 709.

¹*Armour & Co. v. State Dairy, etc. Co.*, 159 Mich. 1, 123 N. W. 580, 25 L. R. A. (N. S.) 616. The court refused to follow *State v. Sealund*, 141 Iowa 461, 120 N. W.

107, which held to the contrary, saying that that decision was based on a penal statute which must be strictly construed.

In some states the statute expressly requires small packages taken from the original large packages to be labeled. *People v. Mack*, 97 N. Y. App. Div. 474, 89 N. Y.

In the Iowa case just cited a pound of lard was sold from a fifty-pound package properly labeled with its constituent parts, and it was held that the dealer was not required to label the small packages sold. This Iowa case is somewhat in harmony with several English cases. A statute of that country requires that "every package, whether open or closed, and containing margarine, shall be branded or durably marked 'Margarine' on the top, bottom and sides, in printed capital letters, not less than three-quarters of an inch square; and if such margarine be exposed for sale, by retail, there shall be attached to each parcel thereof so exposed, and in such manner as to be clearly visible to the purchaser, a label marked in printed capital letters not less than one and a half inches square 'Margarine;' and every person selling margarine by retail, save in a package duly branded or durably marked as aforesaid, shall in every case deliver the same to the purchaser [or with] a paper wrapper, on which shall be printed in capital letters [not less than a quarter of an inch square] 'Margarine'."² Under the statute it was held that a tub of margarine standing at the back of a counter, from which margarine was scooped and supplied to a customer was a package and must be labeled.³ In another case six pieces of margarine of one pound each, and each partly wrapped in paper, were piled up on each other in a pyramid in a shop window. One margarine label was put upon the whole heap (on the bottom pieces). An inspector bought the top piece. It was held that the six pieces formed one "parcel," and that the parcel was properly labeled.⁴

Supp. 1004; *People v. Walters*, 114 N. Y. App. Div. 669, 100 N. Y. Supp. 177; affirmed, 188 N. Y. 632, 81 N. E. 1171 (renovated butter); *Commonwealth v. Bean*, 148 Mass. 172, 19 N. E. 163; *State v. Newton*, 50 N. J. L. 549, 18 Atl. 77; *State v. Capitol City Dairy Co.*, 62 Ohio St. 350, 57 L. R. A. 62, 57 L. R. A. 181 (oleomargarine).

² 50 and 51 Vict., c. 29, § 6.

³ *McNair v. Horan*, 68 J. P. 518, 91 L. T. 555, 20 Cox C. C. 729, 2 L. G. R. 1239. A like decision was made in an Irish case. *Maguire v. Porter* [1905], 2 I. R. 147.

⁴ *Parkinson v. McNair*, 69 J. P. 399, 93 L. T. 553, 21 Cox C. C. 42, 3 L. G. R. 982. See also *Wheat v. Brown* [1892], 1 Q. R. 418, 56

§ 67. Branding Fruit for Shipment to Show Locality Where Grown.

A statute which requires fruit packed for shipment to be branded so as to show the locality where it is grown is unconstitutional. Such an act is not designed to prevent either false labeling or the shipping of diseased fruit. It is calculated to secure to fruit growers of some well advertised and favored localities an advantage in the disposition of their fruit. It is an improper use of the police power, or, rather, the police power does not authorize its enactment.¹

In the California case the court said: "It [the statute] requires merely that every shipment of every package of fruit, whether it be from the small farmers with a few trees or vines, or whether it be from the large producer, must in every instance bear a label naming the county and immediate locality in which the fruit was grown. It is a matter of common knowledge that this requirement would work the absolute destruction of certain important branches of industry. Dried fruit, such as prunes, peaches, apricots, are gathered in establishments, in enormous quantities, from the State over. These fruits, when dried, are assorted by grade and quality, and, thus assorted and packed, are shipped to the uttermost parts of the earth. It would absolutely prohibit this industry, if these fruit driers were compelled to label each package with the names of the localities from which the fruit came, and, if it did not absolutely prohibit it, it would render their business so onerous, complicated, and expensive, as seriously to imperil its existence. It is plain, therefore, that the Act was not designed to prevent either false labeling or the shipping of diseased fruit, and, if so designed, it is both meaningless for this purpose and burdensome for all others. It seems apparent that the true purpose of the act was to obtain for the fruit raisers of some well advertised and favored localities an advantage in the disposition of their own fruit. But this, for the reasons well

J. P. 153, 61 L. J. M. C. 94, 66 L. T.
464, 40 W. R. 462, and Collett v.
Walker, 59 J. P. 600.

¹ Ex parte Hayden, 147 Cal. 649,
82 Pac. 315, 1 L. R. A. (N. S.)
184, 109 Am. St. 183.

and elaborately set forth in *People v. Hawkins*,³ forms no part of the police power, and is wholly beyond the prerogative of the Legislature."⁴

§ 68. Official Certification that Article has been Inspected—Stamping.

In the case of fertilizers a statute requiring them to be inspected, certified to and stamped has been upheld.¹ This was held true even as to fertilizer imported into the State. So a statute has been held valid which required that there shall be attached to each package of fertilizer a tag, to be furnished by the agricultural commissioners of the State.² How far the State may go in requiring food to be both inspected and certified to as to its purity or impurity, does not clearly appear. That it may require it to be inspected, is very clear; and that is for the purpose of determining whether or not it is fit for food. As the State may require food offered on the market to be inspected, there is no reason why it may not require a certificate of its purity or impurity to accompany the inspection.³

§ 69. Marking Weight of Packages on Label.

Statutes requiring the weight of a package to be marked on its cover or label have been held both valid and invalid.

¹ 157 N. Y. 1, 51 N. E. 257, 68 Am. St. 736, 42 L. R. A. 490.

⁴ *Ex parte Hayden*, 147 Cal. 649, 82 Pac. 315, 1 L. R. A. (N. S.) 184, 109 Am. St. 183.

So where a statute was held invalid which required goods manufactured in a state penitentiary to be marked "Convict Made." *People v. Hawkins*, 157 N. Y. 1, 51 N. E. 257, 68 Am. St. 736, 42 L. R. A. 490. But this statute was held invalid on the ground that it was an interference with interstate commerce. The defendant

had been convicted of selling a brush in the State of New York which had been made by convict labor in another State, and which had not been marked "Convict Made" as the statute required.

¹ *Woods v. Armstrong*, 54 Ala. 150, 25 Am. Rep. 671; *Renfro v. Lloyd*, 64 Ala. —.

² *Campbell v. Segars*, 81 Ala. 259, 1 So. 714.

³ See *Turner v. Maryland*, 107 U. S. 38, 2 Sup. Ct. 44, 27 L. Ed. 370, affirming 55 Md. 240.

Thus one requiring the marking of small packages of butter intended for sale with their weight in figures not less than a quarter of an inch high was held invalid, because an interference with liberty and property rights, and not a legitimate exercise of the police power. "The Act in question here is not for the purpose of preventing the sale of impure food, or the adulteration of food, or selling one kind of food under the name of another. The offense which it endeavors to create is not that of marking in the exact manner prescribed by the Act. And the manner is certainly a most onerous one. Indeed, it would scarcely be practicable to comply literally with the requirement, and an approximate compliance would be exceedingly expensive and burdensome. The Act does not come within the legitimate scope of the police power as described in the cases above cited,¹ and seems to be an unwarranted restriction on the citizen's constitutional right to his property and to his privilege of freely following a legitimate business, and not required by any public necessity."² But a statute which required tobacco to be packed in hogsheads of stated dimensions, and then to be weighed, numbered and marked with the name and address of the owner, is valid. This is based on the power of the State to inspect tobacco. "Fixing the identity and weight of tobacco alleged to have been grown in the State, and thus preserving the reputation of the article in markets outside of the State, is a legitimate part of inspection laws; and the means prescribed therefor in the statute in question naturally conduces to that end. Such provisions, as parts of inspection laws, are as proper as provisions for inspecting quality; and it

¹ They are *Ex parte Drexel*, 147 Cal. 763, 82 Pac. 429, 2 L. R. A. (N. S.) 588; *Ex parte Hayden*, 147 Cal. 649, 82 Pac. 315, 1 L. R. A. (N. S.) 184, 109 Am. St. 183; *Ex parte Dickey*, 144 Cal. 234, 77 Pac. 924, 66 L. R. A. 928, 103 Am. St. 82; *State v. Snow*, 81 Iowa 642, 47 N. W. 777, 11 L. R. A. 355; *Ex parte Jentzsch*, 112 Cal. 468,

44 Pac. 803, 32 L. R. A. 664; *In re Kelso*, 147 Cal. 609, 82 Pac. 241, 2 L. R. A. (N. S.) 796, 109 Am. St. 178; *Ex parte Whitwell*, 98 Cal. 73, 32 Pac. 870, 19 L. R. A. 727, 35 Am. St. 152.

² *Ex parte Dietrick*, 149 Cal. 104; 84 Pac. 770, 5 L. R. A. (N. S.) 873.

cannot be said that the absence of the latter provision, in respect to any particular class of tobacco, necessarily causes the laws containing the former provision to cease to be inspection laws."³ So, notwithstanding what has been previously said, it has been held in Nebraska that a statute requiring packages of food to be marked with their weight, was valid.⁴

§ 70. Weight of Loaves of Bread.

A statute empowering a municipality "to direct and regulate the weight and quality of bread, the size of the loaf, and the inspecting thereof," has been held valid, and authorizes its council to adopt an ordinance carrying out the powers it grants. The court thus discusses the question:

'It is claimed by defendants that, in order to get a pound of baked bread, they are compelled to put into the oven more than a pound of dough, and that the process of baking reduces the weight, and, when asked what it is that evaporates, they reply 'water.' But they say the process of baking is not always uniform. The oven may be too hot. In such case, the bread crusts or skins quickly, retaining its moisture. And, again, it may be too cold; in which case the bread dries up rather than bakes, and, in order to insure a pound loaf, the latter contingency must be provided against, and the weight of the dough must always be regulated accordingly. That fermentation is not always regular, and, when it reaches a certain point, the dough must be put into the oven, without reference to the condition of the oven. That the cutting up of the dough, the weighing of it, and its transfer to the oven is necessarily hurried, and the scales are liable to become clogged or affected by dust. Notwithstanding all the difficulties suggested by respondents, the evidence shows that the bread inspector has been diligent in the performance of his duties; had frequently visited the several bakeries of defendants, and but one of these defendants has, before this time, been complained of, and that was

³ *Turner v. Maryland*, 107 U. S. 38, 2 Sup. Ct. 44, 27 L. Ed. 370, affirming 55 Md. 240.

⁴ *Frederick v. State* (Neb.), 131 N. W. 618; *Lichtersteiger v. State* (Neb.), 131 N. W. 623.

fifteen years ago; and it is admitted by defendants, not only that the ordinance may be complied with, but that the short-weight bread discovered by the inspector was made for the very purpose of testing the validity of this ordinance; and, after the authorities had caused complaint to be made against defendants, they resumed the former manner of doing business, and made their bread in accordance with the provisions of the ordinance. Again it is claimed that a barrel of flour will make two hundred and fifty loaves of bread, and that it is impossible to distribute an ordinary advance in price of flour over this product; in other words, that the price of a loaf of bread can not be advanced a fraction of a cent. This difficulty affects the retail dealer more than the wholesaler. It has to be met in the sale of a pound of nails, of a dozen buttons, or of a paper of needles, as well as in the sale of a loaf of bread. The ordinance does not attempt to regulate the price of the commodity. That is not necessarily fixed with reference to flour at its cheapest price, so that, until the price of flour is reduced until it reaches a point where the reduction may be distributed, the dealer gets the advantage of the reduction, and when it advances above the standard the consumer gets the advantage, until a point is reached where the advance may be added. This fluctuation and these results are ordinary incidents of trade. The State may institute any reasonable preventive remedy when the frequency of the frauds, or the difficulty experienced by individuals in circumventing them, is so great that no other means will prove efficacious. Bread is an article of general consumption. It is usually sold by the loaf, and the individual consumer, in the majority of cases, buys a single loaf. Each transaction involves but a few pennies, although the number of individual transactions in a large city reaches each day into the thousands, and the opportunities for fraud are frequent. It would be practically impossible to prevent fraud in the sale of short-weight loaves, if the matter was left to the ordinary legal remedy afforded the individual consumer for fraud or deceit. The amount involved would not justify a resort to litigation. Sales are invariably made

in loaves of the size of one, two or four pound packages, and the ordinance simply takes the usual and ordinary packages or loaves into which bread is made, and fixes the standard of weight of each package. It does not prohibit the sale of bread by weight if it overruns, as it is claimed that it sometimes does, nor does it prohibit the exaction of an increased price by reason of the additional weight. It does not prohibit the sale of a half or a quarter or any other fraction of a loaf. Our statutes not only fix the number of pounds of each of the various commodities that shall constitute a bushel, but they also provide that a "box" or a "basket" of peaches shall contain one-third of a bushel, and they fix the size of a "barrel" of fruit, roots, or vegetables, and they may, with equal propriety, fix the weight of a package or loaf of bread. The police power of a State is not confined to regulations looking to the preservation of life, health and good order and decency. Laws providing for the detection and prevention of imposition and fraud, as a general proposition, are free from constitutional objection."¹ A statute may be enacted requiring that bread should be sold only in loaves of certain weights, and that they should bear a label showing the weight and address of the maker.²

An ordinance based on such a statute authorizing its enactment is not void as unreasonable on the ground that it attempts to regulate the price of bread, and the elements entering into the composition of bread may so fluctuate in value as to necessitate a change in the price of the loaves. Nor is it invalid on the ground that it can not be complied with without great loss to the baker, as the evaporation of the weight of a loaf changes after leaving the oven, and that to comply with the ordinance the loaf must weigh over a prescribed weight on leaving it. Nor is it void because of the limitation of loaves to certain weights; nor that it did not permit loaves to be sold by special contract other

¹ *People v. Wagner*, 86 Mich. Ill. 167, 90 N. E. 369, 372. This was an ordinance authorized by a statute.

² *Chicago v. Schmidinger*, 243

than those of the weights fixed, though there be a demand in the municipality adopting such ordinance for loaves of other weights.*

§ 71. Marking Capacity of Bottle Containing Liquid.

The Legislature may require a dealer in bottled or canned goods to indicate the amount contained in the bottle or can, or to state the capacity of such bottle or can. It may even require that statement to be blown in the bottle, although thereby the bottles on hand when the statute is enacted are rendered useless for the purpose to which they were then devoted. Such a statute is not the taking of property without just compensation. Thus a statute of Illinois required every milk bottle in which milk was offered for sale to have blown in its side its capacity. This was held to be a valid statute; and a dealer who sold milk in a bottle of less capacity than that marked upon it was liable, even though he did not know it was below the capacity marked. The State may delegate this power to a municipality to exert. Such legislation is not special legislation, although it does not apply to all milk dealers or to all persons who vend substances in liquid form. "Milk or cream are articles of general consumption. They are usually sold by the pint or quart, and, while such transaction involves but a few cents, the number of such transactions in a large city like Chicago reaches a large sum. The opportunities for fraud in their sales are great, and the ordinary legal remedy afforded the individual consumer to protect himself against fraud or deceit is wholly inadequate. Clearly, therefore, an ordinance like the one under consideration is valid, and it is not obnoxious to any of the provisions of the State or national Constitution. Nor does the fact, we think, that the ordinance does not apply to all persons who vend substances in liquid form, or to all persons who engage in the business of selling milk or cream in the city of Chicago, make the ordinance void as special legislation. The ordinance, so framed, applies to all persons

* Chicago v. Schmidinger, *supra*.

who sell milk or cream in bottles or glass jars in the city of Chicago, and in the fullest sense is general in its terms.”¹

§ 72. Destruction of Property Devoted to Manufacture of Oleomargarine Before Enactment of Statute.

A statute which prohibits the manufacture of oleomargarine is not invalid because it prevents the use of property for that purpose which was in such use when it was enacted. It is not the depriving one “of his property without that compensation required by law.”² In this respect the manufacturer of oleomargarine (and perhaps other substances) stands upon the same ground as the manufacturer of beer.²

§ 73. Rate of Taxation, Declaring Illegal—Federal Oleomargarine Statute.

The courts can not declare that the rate of taxation imposed upon a product—as upon oleomargarine—is illegal because too high, even if it prohibit the manufacture of the article taxed. It is for the Legislature to determine what tax shall be imposed, and with that determination the courts can not interfere. The courts are without authority to avoid an Act of the Legislature lawfully exerting the taxing power, even in an instance when to the judicial mind it seems that the Legislature had, in putting the power in motion, abused its lawful authority by levying a tax which was oppressive and unwise, or the result of the enforcement of which might be to indirectly affect subjects not within the powers delegated to or possessed by the Legislature; nor can the courts inquire into the purpose or motive of the Legislature in adopting a statute levying a tax within its constitutional power. In the case of Congress, neither the Fifth nor the Tenth Amendment to the Federal Constitution operates

¹ Chicago v. Bowman Dairy Co., 234 Ill. 294, 84 N. E. 913, 17 L. R. U. S. 678, 8 Sup. Ct. 992, 1257, 32 L. Ed. 253. See also § 74.

A. (N. S.) 684, 123 Am. St. 100.

² Mugler v. Kansas, 123 U. S.

¹ Powell v. Commonwealth, 127

623, 8 Sup. Ct. 273, 31 L. Ed. 205.

to take away the grant of power to tax conferred upon it by the Constitution; and that power being unrestrained except as limited by the Constitution, Congress may select the objects upon which the tax shall be levied, and in exerting the power no want of due process of law can possibly result, and the courts can not usurp the functions of Congress in order to control that branch of the government in exercising its lawful functions. Therefore the Act of Congress of 1886,¹ as amended in 1902, imposing a tax of one-quarter of one percent on oleomargarine not artificially colored any shade of yellow, so as to look like butter, and ten cents a pound if so colored, levies an excise tax, and is not unconstitutional as outside the powers of Congress, or an interference with the powers accorded to the States; nor can the courts declare the tax void because it is too high, nor because it amounts to destruction of the business of the manufacturer of oleomargarine, nor because it discriminates against oleomargarine and in favor of butter.²

¹ 32 U. S. Stat. at Large 93. See Appendix.

² *McCrary v. United States*, 195 U. S. 27, 24 Sup. Ct. 769, 49 L. Ed. 78, citing *Patton v. Brady*, 184 U. S. 608, 22 Sup. Ct. 493, 46 L. Ed. 713; *Knowlton v. Moore*, 178 U. S. 41, 20 Sup. Ct. 747, 44 L. Ed. 969; *Nicol v. Ames*, 173 U. S. 509, 19 Sup. Ct. 622, 43 L. Ed. 786, affirming 89 Fed. 144; *In re Kollock*, 165 U. S. 526, 17 Sup. Ct. 444, 41 L. Ed. 813; *Kilbourn v. Thompson*, 103 U. S. 168, 26 L. Ed. 377; *Champion v. Ames*, 188 U. S. 321, 23 Sup. Ct. 321, 47 L. Ed. 492; *License Tax Cases*, 5 How. 462, 12 L. Ed. 256, affirming 24 Pick. 374, 1 R. I. 193, 13 N. H. 536; *Pacific Insurance Co. v. Soule*, 7 Wall. 433, 19 L. Ed. 95; *Ausin v. Boston*, 7 Wall. 694, 19 L. Ed.

224, affirming 14 Allen 359; *Veazie Bank v. Fenno*, 8 Wall. 533, 19 L. Ed. 482; *Spencer v. Merchant*, 125 U. S. 345, 8 Sup. Ct. 921, 31 L. Ed. 763; *Treat v. White*, 181 U. S. 264, 21 Sup. Ct. 611, 45 L. Ed. 853; *Capitol City Dairy Co. v. Ohio*, 183 U. S. 238, 22 Sup. Ct. 120, 46 L. Ed. 171, affirming 62 Ohio St. 350, 57 L. R. A. 181, 57 N. E. 62.

In the case following a like ruling was made. *Schick v. United States*, 195 U. S. 65, 24 Sup. Ct. 826, 49 L. Ed. 99.

U. S. Supp. Rev. St., p. 505, ch. 840, imposing a tax on manufacturers and dealers in oleomargarine, and regulating the sale of such articles is valid. *United States v. Dougherty*, 101 Fed. 439.

§ 74. Amount of Tax, Validity of Statute.

The amount of tax to be levied upon an article of food so as to restrict its sale is a question for the Legislature and not for the courts. This was held in the case of oleomargarine where the effect of the Federal statute, it was claimed, was to prohibit its manufacture. "As we have said," said the Supreme Court of the United States, "it has been conclusively settled by this court that the tendency of that article to deceive the public into buying it for butter is such that the States may, in the exertion of their police powers, without violating the due process clause of the Fourteenth Amendment, absolutely prohibit the manufacture of the article. It hence results that, even though it be true that the effect of the tax in question is to repress the manufacture of artificially colored oleomargarine, it can not be said that such repression destroys rights which no free government could destroy, and, therefore, no ground exists to sustain the proposition that the judiciary may invoke an implied prohibition, upon the theory that to do so is essential to save such rights from destruction. And the same considerations dispose of the contention based upon the due process clause of the Fifth Amendment. That provision, as we have previously said, does not draw or expressly limit the grant of power to tax conferred upon Congress by the Constitution. From this it follows, as we have also previously declared, that the judiciary is without authority to avoid an Act of Congress exerting the taxing power, even in a case where to the judicial mind it seems that Congress had, in putting such power in motion, abused its lawful authority by levying a tax which was unwise or oppressive, or the result of the enforcement of which might be to indirectly affect subjects not within the powers delegated to Congress. Let us concede that if a case was presented where the abuse of the taxing power was so extreme as to be beyond the principles which we have previously stated, and where it was plain to the judicial mind that the power had been called into play, not for revenue, but solely for the purpose of destroying rights

which could not be rightfully destroyed consistently with the principles of freedom and justice upon which the Constitution rests, that it would be the duty of the courts to say that such an arbitrary act was not merely an abuse of a delegated power, but was the exercise of an authority not conferred. This concession, however, like the one previously made, must be without influence upon the decision of this cause for the reasons previously stated; that is, that the manufacture of artificially colored oleomargarine may be prohibited by a free government without a violation of fundamental rights."¹

§ 75. Injoining Violations of Pure Food Statute.

The Legislature may confer upon a court jurisdiction to enjoin the violation of the pure food laws. Such a statute is valid.¹ So the legality of the acts of a pure food officer, and the question whether he is exceeding his powers, may be tested in an action to enjoin him from the commission of acts alleged to be without authority.²

§ 76. Injoining Void Statute or Ordinance Regulating Sale or Manufacture of Food.

If an ordinance or statute regulating the sale or manufacture of food be void, then its enforcement may be enjoined by a court of equity, and so may all those seeking to enforce it. But the statute or ordinance must involve something more than a penalty if it be violated. If enforced, it must mean the destruction of the complainant's business.¹ But if the statute be valid, its enforcement can not be enjoined by a

¹ *McCrary v. United States*, 195 U. S. 27, 24 Sup. Ct. 769, 49 L. Ed. 78; *Schick v. United States*, 195 U. S. 65, 24 Sup. Ct. 826, 49 L. Ed. 99; *Red C. Oil Mfg. Co. v. Board*, 172 Fed. 695.

¹ *Commonwealth v. Andrews*, 24 Pa. Super. Ct. 571.

² *State v. District Court*, 17 N. D. 285, 115 N. W. 675.

¹ *Bear v. Cedar Rapids*, 147 Iowa

341, 126 N. W. 324, 27 L. R. A. (N. S.) 1150; *Austin v. Austin City Cemetery Asso.*, 87 Tex. 330, 28 S. W. 528, 47 Am. St. 114; *Ewing v. Webster City*, 103 Iowa 226, 72 N. W. 511; *Armour & Co. v. Augusta*, 134 Ga. 178, 67 S. E. 417, 27 L. R. A. (N. S.) 676; *State v. District Court*, 17 N. D. 285, 115 N. W. 675.

Federal court, even though the officer enforcing it gives it an erroneous construction which results disastrously to the business of the person complaining, for to enjoin him in enforcing it would be to enjoin the State he represents; and as the Eleventh Amendment prohibits suit being brought against a State in a Federal court, a suit to enjoin such officer would be a violation of this provision of that organic law.² And aside from a Federal question, the fact that an article of food is widely sold throughout a State will not enlarge the jurisdiction of a court of equity to enjoin the institution of prosecutions against its sale or violation of the pure food laws.³ Nor will equity enjoin an officer charged with the execution of a pure food law from publishing the opinion that a specified product is within the prohibition of the law, for the remedy of the person complaining is an action for libel.⁴

§ 77. Injunction to Prevent Violations of Law.

Statutes sometimes empower courts to issue an injunction restraining the violation of pure food laws. These statutes are valid, even though the defendant be subject to a penalty.¹

§ 78. Title of Statute or Ordinance.

Under a constitutional provision that "Every Act shall embrace but one subject and matter properly connected therewith, which subject shall be expressed in the title," an "Act forbidding the manufacture, sale or offering for sale, of any adulterated foods or drugs, defining foods and drugs, stating wherein adulteration of foods and drugs consists, and defining the duties of the State Board of Health in relation to foods and drugs, their inspection, purity, adulteration, declaring penalties for the violation of the laws, rules and ordi-

² *Arbuckle v. Blackburn*, 51 C. C. C. A. 122, 113 Fed. 616, 65 L. R. A. 864.

864. See also *Scully v. Bird*, 209 U. S. 481, 28 Sup. Ct. 597, 52 L. Ed. —.

³ *Arbuckle v. Blackburn*, 51 C.

⁴ *Arbuckle v. Blackburn*, 51 C. C. A. 122, 113 Fed. 616, 65 L. R. A. 864.

¹ *People v. Windholz*, 68 N. Y. App. Div. 552, 74 N. Y. Supp. 241.

nances concerning foods and drugs, also liquors used or intended for drink," does not violate its provisions; because "forbidding the manufacture and sale of any adulterated foods, drugs or drinks, defining prohibited foods, drugs and drinks, and the duties of the State Board of Health in relation to the inspection and prescribing of standards of purity of foods, drugs and drinks, and declaring penalties for the violation of the law, or all matters clearly tending to a common end, and which unmistakably disclose what that end is."¹ Under a similar constitutional provision an "Act in relation to the manufacture and sale of baking powders, sugars and syrups, vinegars, lards, spirituous and malt liquors, to prevent fraud, and to preserve the public health," is valid. "The Act does not embrace more than one subject," said the court, "within the meaning of the constitutional prohibition. The Act may be fairly designated as one relating to the adulteration of various articles of food and drink, and its provisions are properly related to the general subject."² So, under a similar provision, an ordinance to license and regulate the sale of milk and cream, to provide for their inspection, and prescribing penalties to prevent the sale and distribution of any but pure, wholesome milk and cream, and to fix the minimum limit of its composition, and defining its quality, is valid. "All the provisions of the ordinance are germane to the one subject of regulating the business of vending milk and cream, and the generality of the title is not an objection, so long as it is not made to cover legislation incongruous in itself. Sound policy and legislative convenience dictate a liberal construction of the title and subject matter of enactments to maintain their validity. There is but one subject to this ordinance, and that is clearly expressed in the title."³ A title, "To prevent fraud in the sale of lard," sufficiently expresses the subject of an Act the provisions of which [are] the sale of "lard or any article in-

¹ *Isenhour v. State*, 157 Ind. 517,

62 N. E. 40, 87 Am. St. 228.

² *St. Louis v. Liessing*, 190 Mo.

464, 89 S. W. 64, 1 L. R. A. (N. S.)

³ *Stolz v. Thompson*, 44 Minn.

918, 109 Am. St. 774.

271, 46 N. W. 410.

tended for use as lard," which contains any ingredients but the pure fat of healthy swine, without being plainly marked as provided by statute.⁴

§ 79. Corporation, Quo Warranto.

If a corporation manufacture and sell food of such a character as comes within the prohibition of a statute, it may be proceeded against by quo warranto to have its charter annulled, and the fact that it is subject to a fine for the violation of the statute is not a bar to the prosecution of the quo warranto proceedings. The writ of quo warranto may be invoked to stop the violation of the law on the part of the corporation, and if its acts be flagrant, then to oust the corporation from its powers.¹

§ 80. Municipality Delegating Power to Grant or Refuse a License to Sell Milk.

Although a city have the power to grant a license to sell milk, yet it can not delegate that power to one of the officers or boards and vest him or it with absolute power to arbi-

⁴ State v. Snow, 81 Iowa 642, 47 N. W. 777, 11 L. R. A. 355. "The title of the Act is a plain statement that it is to prevent fraud in the sale of lard, and the body of the Act ought not to be limited to any technical definitions of the word."

See also Commonwealth v. Caulfield, 27 Pa. Super. Ct. Rep. 279.

The Missouri Act of May 11, 1899, was unconstitutional so far as it applied to sellers who are not manufacturers. State v. Great Western, etc., Co., 171 Mo. 634, 71 S. W. 1011, 94 Am. St. 802.

The Nebraska Act, Comp. St. 1901, chap. 33, creating a food commission, is unconstitutional, because it contains more than one subject. Merrill v. State, 65 Neb. 509, 91 N. W. 418. So is the

Pennsylvania Act of June 26, 1895 (P. L. 317), because it does not state the subject of the Act. Commonwealth v. Kebort, 212 Pa. 289, 61 Atl. 895, 26 Pa. Super. Ct. 584.

The Indiana Act, Acts 1899, p. 189, is valid, and embraces only one subject. Isenhour v. State, 157 Ind. 517, 62 N. E. 40, 87 Am. St. 228. For additional cases, see People v. Rotter, 131 Mich. 250, 91 N. W. 167, 9 Detroit L. News 284; Hathaway v. McDonald, 27 Wash. 659, 68 Pac. 376, 91 Am. St. 889; Pratt Food Co. v. Bird, 148 Mich. 631, 112 N. W. 701, 14 Detroit Leg. N. 304, 118 Am. St. 601; Grosvenor v. Duffy, 121 Mich. 220, 80 N. W. 19.

¹ State v. Capitol City Dairy Company, 62 Ohio St. 350, 57 N. E. 62, 57 L. R. A. 181.

trarily grant or refuse the license. "If the city had the power to license it could not delegate this power to another body, leaving to that body a discretion in the matter." All applicants for a license must be placed on an equality.¹

§ 81. Power of Municipality to Inspect Food—Milk—Inspection of Dairies.

The State may, and often does, delegate to and empower municipalities to inspect food, and especially butter, milk and cheese, or dairy products. It is altogether permissible for the State to do this. So long as the ordinances of a municipality are within the power thus conferred and do not contravene the State's laws or Constitution, or the Federal law or Constitution, they are valid. The city has the power to inspect food, and especially milk, and may not only condemn an impure article, but may destroy it. A city may condemn milk upon the spot (when offered for sale, at least, or when held with intent to sell it), take it into custody, and pour it upon the ground, without violating the constitutional provisions of due process of law. Whether or not the Legislature has given municipalities such powers must, of course, depend upon a construction of their charters or general laws under which they are organized. But the principle remains that they may be endowed with such powers.¹ A statute or ordi-

¹ *Bear v. Cedar Rapids*, 147 Iowa 341, 126 N. W. 324, 27 L. R. A. (N. S.) 1150; *State Center v. Barenstein*, 66 Iowa 249, 23 N. W. 652; *Cicero Lumber Co. v. Cicero*, 176 Ill. 27, 51 N. E. 764, 42 L. R. A. 704, 68 Am. St. 163; *Richmond v. Dudley*, 129 Ind. 112, 28 N. E. 312, 13 L. R. A. 587, 28 Am. St. 180; *Yick Wo v. Hopkins*, 118 U. S. 359, 6 Sup. Ct. 1064, 30 L. Ed. 221.

¹ *St. Louis v. Liessing*, 190 Mo. 464, 89 S. W. 611, 1 L. R. A. (N. S.) 918, 109 Am. St. 774; *Deems v. Baltimore*, 80 Md. 164,

30 Atl. 648, 26 L. R. A. 541, 45 Am. St. 339; *St. Louis v. Fischer*, 167 Mo. 654, 67 S. W. 872, 64 L. R. A. 679, 99 Am. St. 614, 194 U. S. 361, 24 Sup. Ct. 673, 48 L. Ed. 1018; *Kansas City v. Marsh Oil Co.*, 140 Mo. 458, 41 S. W. 943; *St. Louis v. Grafeman Dairy Co.*, 190 Mo. 507, 89 S. W. 628, 1 L. R. A. (N. S.) 926; *State v. Dupiquier*, 46 La. 577, 15 So. 502, 49 Am. St. 334, 26 L. R. A. 162; *St. Louis v. Weber*, 44 Mo. 547; *Gundling v. Chicago*, 177 U. S. 183, 20 Sup. Ct. 633, 44 L. Ed. 725; *Norfolk v. Flynn*, 101 Va. 473, 44 S. E.

nance which requires all milk offered to be sold to be first inspected is valid, even as to those bringing milk into the city from the country.² "The manifest purpose of the statute," it was said in one case, "under which this ordinance was passed, was to enable the city council to adopt such reasonable notice regulations as would prevent the sale of unwholesome milk within the city, and not merely to prevent the keeping of unhealthy dairy herds within the city limits. It is a matter of common knowledge that much of the milk sold in a city is produced in dairies situated outside the city limits. Any police regulations that did not provide means for insuring the wholesomeness of milk thus brought into the city for sale and consumption would provide very inadequate protection to the lives and health of the citizens. It is also a matter of common knowledge, as well as of proof in this case, that the wholesomeness of milk can not always be determined by an examination of the milk itself. To determine whether it does or does not contain the germs of any contagious or infectious disease it is necessary to inspect the animals which produce it. The inspection of dairies or dairy herds outside the city limits, provided for by this ordinance, applies only to those whose milk product it is proposed to sell in the city. The provisions of the ordinance in that regard go only so far as it is reasonably necessary to prevent the milk of diseased cows being sold within the city. The inspection is wholly voluntary on the part of the owner of the dairy or dairy herd. If he does not choose to submit to such inspection, the result merely is that he, or the one to whom he furnishes milk, can not obtain a license to sell milk within the city. The ordinance has no extra-territorial operation, and there has been no attempt to give it any such effect. The only subject upon which it operates is the sale of milk within the city."³ Under a charter empowering a municipi-

717, 99 Am. St. 918, 62 L. R. A. 771; Weigand v. District of Columbia, 22 App. D. C. 559; St. Louis v. Schuler, 190 Mo. 524, 89 S. W. 621, 1 L. R. A. (N. S.) 928.

² Norfolk v. Flynn, 101 Va. 473,

44 S. E. 417, 62 L. R. A. 771, 99 Am. St. 918.

³ State v. Nelson, 66 Minn. 166, 68 N. W. 1066, 34 L. R. A. 318, 61 Am. St. 399, quoted in Norfolk v. Flynn, 101 Va. 473, 44 S. E.

pality to exact a license tax, and to regulate all kinds of business, and conferring on it full power to inspect food products and dairies, and to require the payment of reasonable charges for such inspection, it has power to enact an ordinance imposing a license tax on dairymen selling milk or butter, at the rate of fifty cents for each cow used in the production of milk or butter.⁴ So under its usual powers a municipality may enact an ordinance requiring milk exposed for sale to contain a certain percent of butter fat, estimated by a designated process, and provide that in a contested analysis of milk butter fat shall be estimated in a manner described. Such an ordinance is not open to the objection that it prescribes a rule of evidence, or that it is too indefinite to be enforced.⁵ So a municipality may exact a license for the sale of milk.⁶ So an ordinance forbidding the sale of milk containing a preservative is within the power of a municipality to enact ordinances necessary or reasonably appearing to be necessary for the public health, even though a preservative not injurious to health be used.⁷ So under a power to inspect milk, to secure the general health, and to pass all ordinances expedient in maintaining the health and welfare of a city, its trade, commerce and manufacture, it may pass an ordinance forbidding the sale of milk and cream containing coloring matter, its purpose being to prevent deception on the public and unfair advantage over honest competitors.⁸ So an ordinance forbidding the sale of cream con-

717, 62 L. R. A. 771, 99 Am. St. 918; *Walton v. Toledo*, 23 Ohio Cir. Ct. Rep. 547.

⁴ *Birmingham v. Goldstein*, 151 Ala. 473, 44 So. 113.

⁵ *St. Louis v. Bippen*, 201 Mo. 528, 100 S. W. 1048; *St. Louis v. Klausman*, 213 Mo. 119, 112 N. W. 516; *St. Louis v. Union Dairy Co.*, 213 Mo. 148, 112 N. W. 525. Such an ordinance does not deprive the milk seller of his liberty and property without due process of law,

contrary to the Fourteenth Amendment. See also *St. Louis v. Grafeman*, 190 Mo. 507, 89 S. W. 627, 1 L. R. A. (N. S.) 926.

⁶ *People v. Gilman* (N. Y.), 103 N. Y. Supp. 954; *St. Louis v. Grafeman*, 190 Mo. 492, 89 S. W. 617.

⁷ *St. Louis v. Schuler*, 190 Mo. 524, 89 S. W. 621, 1 L. R. A. (N. S.) 928.

⁸ *St. Louis v. Polinsky*, 190 Mo. 516, 89 S. W. 625.

taining less than twelve percent of butter fat is valid.⁹ Where a statute was enacted prescribing the percentage and standards of purity of dairy products fixed, with the exception of one of the elements of skimmed milk, a lower standard of strength and purity than that fixed by a State statute relating to the same subject, and, in addition, requiring certain ingredients and percentages thereof in whole milk and skimmed milk not called for by the statute, it was held that the additional requirements of the ordinance did not render it invalid or inconsistent with the statutes, except as to the skimmed milk requirement, where the additional requirements were not in conflict with the statutory requirement, but were merely additional to and supplemental of the statutes in fixing the standard of purity, where the city charter expressly empowered the municipal council to establish standards of strength and percentages of purity of dairy products and the power to provide for their inspection.¹⁰ A city may enact ordinances supplemental and in addition to the State laws relating to standards of purity in dairy products and providing for their inspection.¹¹ So a rule of the health department of a city requiring milk peddlers to provide a special room for storing milk and for cleansing utensils as a condition precedent to obtaining a license to peddle milk, has been held valid.¹² Under a power to regulate and restrain the sale of milk, to tax, license, regulate and restrain vendors of milk, and to fix and regulate the amount of a license, a municipality has power to revoke milk licenses and to vest that power in the health commissioner, with the right to exercise the power summarily, and even without notice.¹³ Under a charter authorizing a municipality to regulate the

⁹ *St. Louis v. Reuter*, 190 Mo. 514, 89 S. W. 628.

¹⁰ *St. Louis v. Klausmeier*, 213 Mo. —, 112 S. W. 516; *St. Louis v. Union Dairy Co.*, 213 Mo. —, 112 S. W. 525; *St. Louis v. Ameln* (Mo.), 139 S. W. 429; *St. Louis v. Scheer* (Mo.), 139 S. W. 434; *St. Louis v. Kellman* (Mo.), 139 S. W. 443; *St. Louis v. Krue-*

peler (Mo.), 139 S. W. 446; *St. Louis v. Schulte* (Mo.), 135 S. W. 449.

¹¹ *St. Louis v. Klausman*, *supra*; *St. Louis v. Union Dairy Co.*, *supra*.

¹² *People v. Owen* (N. Y.), 116 N. Y. Supp. 502.

¹³ *State v. Milwaukee*, 140 Wis. 38, 121 N. W. 658.

sale of butter and all other provisions, to provide and regulate their inspection, to secure the general health, to prevent the introduction of contagious diseases, and to pass all ordinances and make all regulations necessary to preserve the health of the inhabitants, such municipality may adopt an ordinance regulating the inspection and sale of milk and making it an offense to sell milk within the city without a permit from the municipal food and dairy commissioner, notwithstanding milk is not specifically mentioned in the statutes as a subject of regulation, for it is included in the term "other provisions," as well as under the clause empowering the enactment of ordinances for the protection of the health of the city.¹⁴ Under its general welfare clause a municipality may regulate the sale of milk.¹⁵ Under a power to make regulations for the preservation of health, a regulation requiring sellers of milk to register each year before receiving a license to sell milk for one year is valid.¹⁶ But when a city charter forbade the council to pass any ordinance on any matter regulated by a general statute, and a general statute provided full regulations concerning the adulteration of milk, it was held that an ordinance forbidding the sale of pure milk, and requiring, among other things, that all milk dealers should obtain a license, was void, because beyond the power of the council to enact.¹⁷ Under its power to protect the public health a municipality may establish and control markets at which perishable food, such as fish, shall be sold; or it may regulate and control such markets established by private individuals and carried on as private enterprises; and it may also prevent the sale of perishable food, such as fish, except at the public markets and within certain limits about them; but it may not entirely prevent the sale of such products within its limits.¹⁸ Under its general welfare clause, a municipality may prohibit the sale of ice cream which is

¹⁴ *Salt Lake City v. Howe*, 37 Utah —, 106 Pac. 705. affirmed 70 N. Y. App. Div. 326, 75 N. Y. Supp. 245.

¹⁵ *Rigbers v. Atlanta*, 7 Ga. App. 411, 66 S. E. 991.

¹⁷ *State v. Tyrrell*, 73 Conn. 407, 47 Atl. 686.

¹⁶ *Gloversville v. Enos*, 35 N. Y. Misc. Rep. 724, 72 N. Y. Supp. 398;

¹⁸ *State v. Perry*, 151 N. C. 661, 65 S. E. 915; *Ex parte Byrd*, 84 Ala.

adulterated or contains any deleterious substance, or is otherwise impure or unwholesome; but it can not arbitrarily prescribe that ice cream containing less than a certain percentage of butter fats shall not be sold at all, if the percentage be placed so high as to be unreasonable, where it excludes ice cream which is as wholesome as that of the prescribed percentage would be.¹⁹ But where a statute provided that, before any person can sell oleomargarine, he shall mark the packages in bold-faced English letters, and prescribed a punishment for a violation of the Act, it was held that the sale of oleomargarine in unmarked packages, being an unlawful occupation, cities having the power to license all lawful occupations carried on within their limits could license and regulate the sale of oleomargarine therein irrespective of such Act.²⁰ A statute empowering a city "to regulate the vending of meats, vegetables and fruits, pickled and other fish, and to prescribe the time and place of selling the same, and to regulate the sale of coal, and any other commodity exposed or intended to be exposed for sale in the city," does not authorize an ordinance imposing a fine for the sale of "putrid meat, poultry or other provisions."²¹ It is a valid exercise of the police power for a city to prohibit the sale of skimmed milk, though having a commercial value and not

17, 4 So. 397, 5 Am. St. 328. A city can not absolutely prohibit the sale of useful and valuable commodities not coming up to a prescribed standard. *Rigbers v. Atlanta*, 7 Ga. App. 411, 66 S. E. 991.

¹⁹ *Rigbers v. Atlanta*, 7 Ga. App. 411, 66 S. E. 991.

²⁰ *Haines v. People*, 7 Colo. App. 467, 43 Pac. 1047. See also *Walton v. Toledo*, 23 Ohio Cir. Ct. Rep. 547.

A provision in a statute authorizing a city to regulate the sale of meats and vegetables empowers that city to pass an ordinance prohibiting the peddling of fruits and

garden or farm products in the public streets between the hours of five in the morning and one in the afternoon. *Buffalo v. Schleifer*, 2 N. Y. Misc. Rep. 216, 21 N. Y. Supp. 913; *Morano v. New Orleans*, 2 La. 217.

A city may prohibit the sale of and delivery of milk from vehicles in the streets by unlicensed persons, and may declare the violation of such ordinance a misdemeanor. It may even prevent a chartered association from so delivering milk. *People v. Mulholland*, 82 N. Y. 324, 37 Am. Rep. 568.

²¹ *Rochester v. Rood, Hill & D.* 146.

unwholesome for adults.²² So an ordinance providing that bread shall be manufactured into loaves of one, two and four pounds, and no other, and prohibiting the sale of bread deficient in weight, has been upheld.²³ A municipal charter which makes it the duty of the council to prevent the sale of adulterated food, enables it to enact an ordinance prohibiting the adulteration of milk.²⁴ So a charter authorizing the enactment of an ordinance to preserve the health of the city, and for the proper inspection of milk, authorizes the enactment of one for the destruction of milk found upon inspection not to come up to the standard prescribed.²⁵

§ 82. Regulation and Sale of Drugs and Poisons.

The regulation of the practice of pharmacy and of the sale of drugs and poisons comes peculiarly within the province of the police power of the State.¹

²² *Kansas City v. Cook*, 38 Mo. App. 660.

²³ Such an ordinance does not authorize the seizure of shortweight bread, and the prohibition is not the taking of private property without compensation. *People v. Wagner*, 86 Mich. 594, 49 N. W. 609, 13 L. R. A. 286, 24 Am. St. 141.

²⁴ *State v. Stone*, 46 La. Ann. 147, 15 So. 11.

²⁵ *Deems v. Baltimore*, 80 Md. 164, 30 Atl. 648, 26 L. R. A. 541, 45 Am. St. 339.

An ordinance providing for the inspection of milk coming from outside the city and requiring the tuberculin test and certificate of freedom from disease of cows producing the milk is not invalid because it singles out milk dealers outside the city, and does not apply to dealers within the city, where dealers within the city are subject to the supervision of its

Board of Health. *Adams v. Milwaukee*, 144 Wis. 371, 129 N. W. 518.

A municipality may prescribe lower but not higher requirements concerning the percentage of fat in milk. *St. Louis v. Schulte* (Mo.), 139 S. W. 449; *St. Louis v. Scheer* (Mo.), 139 S. W. 34.

¹ *State v. Kumpfert*, 115 La. 950, 40 So. 365; *Bertram v. Commonwealth*, 108 Va. 902, 62 S. E. 969; *State v. Lee*, 137 Mo. 143, 38 S. W. 583 (regulating sale of opium); *Commonwealth v. Zacharias*, 5 Pa. Dist. Rep. 475; *Luck v. Sears*, 29 Ore. 421, 54 Am. St. 804; *Charleston v. Werner*, 46 S. C. 323, 24 S. E. 207; *Newton v. Joyce*, 166 Mass. 83, 44 N. E. 116, 55 Am. St. 385; *Noel v. People*, 187 Ill. 587, 58 N. E. 616, 52 L. R. A. 287, 79 Am. St. 238; *Sadler v. People*, 188 Ill. 243, 58 N. E. 906; *State v. Abraham*, 78 Vt. 53, 61 Atl. 766.

PART II

FEDERAL PURE FOOD AND DRUGS ACT OF JUNE 30, 1906

CHAPTER II.

PURPOSE AND VALIDITY OF ACT OF 1906.

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| 83. Federal Act of June 30, 1906. | territories in the District of Columbia and territories. |
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| 94. District of Columbia and territories. | 106. Imported teas. |
| 95. Inspection of materials and factories | 107. Declaration concerning imported food and drugs. |
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§ 83. Federal Act of June 30, 1906.

On June 30, 1906, Congress enacted a statute concerning Food and Drugs entering into Interstate Commerce that has had a far-reaching effect. Constructions by the courts have been placed upon many of the provisions of this statute, and many others have been construed by the Department of Agriculture in their practical applications to every day transactions. Not yet have all the powers conferred by the Act been fully ascertained, determined or settled, and there probably will be many debatable questions for many years yet to come. The statute has been attacked in many of its phases, and between the government and many manufacturers and importers much friction has arisen. The assumption of authority by the Department of Agriculture to condemn patent or proprietary medicines, whose proprietors claimed for them virtues or curative properties they did not possess, has met with signal defeat at the hands of the Supreme Court of the United States, which denied that the Act covered false claims concerning their curative powers. As a rule, the Department of Agriculture has been sustained by the courts in its construction and efforts to enforce the Act.

§ 84. Purpose of Statute.

One needs go no farther than the title of the Federal Food and Drugs Act of 1906 to ascertain the purpose of the enactment of that statute. That purpose, as there declared, is to prevent "the manufacture, sale or transportation of adulterated or misbranded or poisonous or deleterious foods, drugs, medicines and liquors, and for regulating traffic therein." The words "and for other purposes" are added to this enumeration, but they do not add to the force of the words that precede them. Previous to the enactment of this statute, many States had enacted laws upon its subject matter, but, owing to the dual form of government under which we live—the right to ship articles of merchandise from one State to another, and its partial immunity from the laws of the State

to which it is shipped even on its arrival—these State statutes were found inadequate to thoroughly deal with the many questions of pure food and drugs that continually presented themselves. The two great purposes of this statute are “to prevent misbranding and to prohibit adulteration.”¹ Upon the part of the consumers there was a demand for this legislation—a demand that constantly gained in force as the evils arising from the consumption of adulterated food and the use of adulterated drugs became better known; which gained impetus as the unscrupulous manufacturer, by experience, gained more and more ability every day to conceal the adulterated condition of his products, and thus deceive the public. There was a demand on the part of the consumer that he be protected from the evil results arising out of the nefarious practice of adulteration. On the part of reputable and honest manufacturers there was also a demand that their honestly made products be protected from competition of the adulterated and cheaper manufactured products. The consumer did not contemplate with much complacency the purchase of sand in his sugar or of chicory in his coffee, and the physician viewed with alarm the failure of the drug he prescribed to produce the result in his patient that his experience taught him it should produce. From these various sources arose demands for laws that would protect the consumers from these harmful practices which the Legislature in time took notice of and heeded. The purpose of the statute is, therefore, to secure to the consumer unadulterated food and drugs as far as it can reasonably be done.² “Sev-

¹ F. I. D. 44, N. J. 543; *United States v. Buffalo Cold Storage Co.*, 179 Fed. 865, N. J. 482.

² “So you will see what the purpose of Congress was, and one who is desirous of knowing what the law is in that regard may not make any mistake about it. The law requires the manufacturer to be honest in his statement of the contents of the package, it requires him to

be honest in stating the truth upon the labels put upon it. That is all there is to the Act. That is what the act is intended to accomplish, and which, if properly enforced, in my judgment, it will accomplish.

It is the duty of you [as jurors] and of the Court to obey the law and to enforce it; to enforce this statute as you would enforce any other statute. But it is not out of

eral of the States within the past few years have enacted pure food statutes. Congress, June 30, 1906, enacted the statute in question. All these statutes were enacted to cure evils well nigh intolerable that had grown up during this age of greed and avarice and commercialism that has made money-getting the prime object of life with so many. The evils were such that much of the foods we ate, whether meats of any kind, including fish and poultry, or fruits in all forms, and breadstuffs, were so adulterated and 'loaded' or 'doctored' as to deceive the consumer. And the same was true of flavors and condiments. The evil as to confectionery and flavors and extracts was as great. Still greater was the evil as to drugs and medicines. In fact, the evils were everywhere present, as to food and medicine, and other things. And to eliminate some of these evils and to enable the purchasers to receive what they ordered and paid for, many States passed statutes aimed at those frauds. But it was soon found that the States in some instances were disposed to condone as to some articles of local manufacture, and in many other instances the States were powerless to work out a remedy. Thereupon Congress, acting upon the theory that the evil was of national concern, enacted the statute in question. The debates in Congress show that the measure was earnestly fought as being one of paternalism, and a police regulation with which the States only could act."³ "The object of the

place for me to say here, that in the judgment of the court, no Act of Congress has been passed in recent years of more importance than this one.

In dealing with food stuffs the seller should, and ought to know, what he is selling, and on the other hand the buyer should know what he is buying.

The statute is not to be evaded by mere subterfuge. It is to be enforced according to its letter and its spirit and when that is done no one

suffers by it." *United States v. Edward Weston Tea & Spice Co.*

Notice of judgment, 194.

"The great object of the statute is to prevent injury to health and deception by words or devices on the label which naturally lead the purchaser to believe that he is getting one thing when in reality he is getting another." *N. J.* 990.

³ *Shawnee Milling Co. v. Temple*, 179 Fed. 517. Notice of Judgment 497.

law," said the Supreme Court of the United States, "is to keep adulterated articles out of the channels of interstate commerce, or, if they enter such commerce, to condemn them while being transported or when they have reached their destination, provided they remain unloaded, unsold, or in original unbroken packages."⁴

§ 85. Scope of the Statute Territorially.

By the first section of the Food and Drugs Act, it is provided "that it shall be unlawful for any person to manufacture, within any Territory or the District of Columbia, any article of food or drug which is adulterated or misbranded, within the meaning of this Act," and by the twelfth section it is declared "that the term 'Territory' as used in the Act shall include the insular possessions of the United States." These clauses relate only to the manufacture of adulterated or misbranded food and drugs within any Territory or the District of Columbia or any of the insular possessions. They do not relate to the manufacture or misbranding of adulterated food or drugs within a State. In these clauses Congress recognizes its limitations and lack of power to legislate concerning the manufacture and misbranding of food and drugs within a State. That is a matter of legislation for the State,

⁴ "Hiplite Egg Co. v. United States, 219 U. S. —, 31 Sup. Ct. 364, 55 L. Ed. —.

"The Food and Drugs Act is one of the most beneficent legislative enactments of recent times, and its provisions must be observed.—N. J. 823.

"The purpose of this Act is to conserve the public health by preventing interstate commerce in poisonous or deleterious foods and drugs, and, in order that this may be affected, it is not only made a misdemeanor under the Act, but the article of food or drug adulter-

ated or misbranded is declared to be forfeited as an offending thing which threatens the health of the citizen and therefore subject to seizure without regard to the acts or knowledge of the owners or claimants." United States v. Five Boxes of *Asafoetida*, 181 Fed. 561.

"The great object of the statute is to prevent injury to health and deception by words or devices on the label which may naturally lead its purchaser to believe that he is getting one thing when in reality he is getting another." N. J. 990 in Appendix C.

not for the Federal government. In the third section there is a further recognition of this limitation, wherein it is made an offense to "sell or offer for sale in the District of Columbia or the Territories of the United States any such adulterated or misbranded foods or drugs, or export or offer to export the same to any foreign country." This clause, of course, covers the insular possessions. Within these districts Congress is supreme—more so than a Legislature is within the boundaries of the State for which it legislates—for such Legislature is limited in a way by the Constitution of the United States, while Congress, in respect to the insular possessions, is unlimited. Congress has legislated concerning distilled and fermented liquors, oleomargarine, renovated butter and filled cheese, and has regulated their manufacture, but the legislation is only concerning Federal taxation, and the regulation of the manufacture is only incidental to such taxation.

§ 86. Commerce Within a State.

Section two of the Food and Drugs Act is very carefully drawn, so as to limit its application within a State to the strict line of foreign and interstate commerce. To constitute an act an offense under this section, it must relate to the introduction into the State, aside from the introduction into the District of Columbia or into a Territory, of an adulterated or misbranded article of food or a drug "from any other State or Territory or the District of Columbia, or from any foreign country." This is prohibited. This section also forbids the shipment or delivery "for shipment from any State or Territory, or the District of Columbia, to any other State or Territory or the District of Columbia, or to a foreign country," any adulterated or misbranded food or drug, and it inflicts a penalty upon any one "who shall receive in any State or Territory or the District of Columbia, from any other State or Territory or the District of Columbia, or foreign countries, and having so received, shall deliver, in original unbroken packages, for pay or otherwise, or offer to deliver to any other person, any such article so adulterated or mis-

branded." If a person purchase and receive within the State adulterated or misbranded food or drugs, and deliver it or them, whether in original or broken packages, to another person or dealer within the State, he commits no offense under this statute. But if he has received such food or drugs from without the State, and delivered it or them, even in the original packages, to a person or dealer within the State, he will be liable if the delivery be in the original package. If the package be broken, then it falls within the mass of State property, and becomes subject to the State's laws. The mere receipt of an adulterated or misbranded drug or food does not constitute an offense in the person receiving them if he has not delivered or offered to deliver the drug or food in unbroken packages. Nor is it an offense in the receiver if he has received adulterated or misbranded food or drugs and, having opened the original packages and tested their contents, he then properly brands them and then offers them for sale, and such food or drugs are not liable to forfeiture if he has done this before their seizure."¹

§ 87. Constitutionality of Act of 1906.

It has been held that the Food and Drugs Act of June 30, 1906, is constitutional. A milling company of the State of Kansas brought a bill in equity to restrain the District Attorney and United States Marshal for the District of Kansas seizing certain sacks of bleached flour, charging that this statute was unconstitutional, and that they were, therefore, proceeding without warrant of authority. The court stated the question thus: "In the one case before the court, the bill of complaint recites that several seizures of flour were made in this judicial district, and after a number of efforts by the complainant to have the cause submitted to the court with or without injury for a hearing on its merits, the government dismissed the cause, after the flour thus seized had deteriorated in quality and value. In the cause now before the court, as property rights are involved, bills in equity will

¹ United States v. Five Boxes of *Assafoetida*, 181 Fed. 561.

be entertained, provided the statute under which the government claims the right to proceed is not a valid one. Herein is the question in the case. That is to say, is the pure food statute of June 30, 1906, a valid enactment? Did Congress have the power to enact it? Is it within the commerce clause of the Constitution, or is it a mere police regulation erroneously garbed and cloaked as a regulation of commerce?" "Congress is given the power to provide for the general welfare of the United States. But, without doubt, if this legislation is sustained, it is because of that provision of the Constitution that provides that the Congress shall have the power to regulate commerce among the several States. That provision is the life of the nation, and to adopt which was the great concern of the convention of 1787. Important as it is, it is ever before the courts. It gives great comfort to all who believe in one common country, and yet is antagonized oftener than any other provision of the Constitution by those whose shield of defense is articles 9 and 10 of the amendments, as to the reserved power of the States." "It is conceded that police regulations alone are for the State, and not for Congress to deal with. But it does not follow that if the subject matter to be regulated is one of commerce, that it is for the State alone to deal with, because such subject matter is also one that pertains to the morals, health or good order of the community. Thus when the question arose as to the inspection of meats for food, Legislatures claiming that they alone could determine when and to what extent police regulations should be carried, the Supreme Court decided that such inspections also infringed upon the rights of commerce and were therefore void.¹

"It will serve no purpose to discuss the principle upheld in *Wilson v. Blackbird Creek Company*,² that the State can regulate certain interstate commerce of a local character, if Congress had not acted, nor of that other principle upheld

¹ Citing *Minnesota v. Barber*, 136 U. S. 313, 10 Sup. Ct. 862, 34 L. Ed. 455, affirming 39 Fed. 641; *Brimmer v. Rebman*, 138 U. S. 78, 11 Sup. Ct. 213, 34 L. Ed. 862, affirming 41 Fed. 867.

² Pet. 245, 7 L. Ed. —.

by Congress that the State can legislate with reference to liability when doing an interstate business when Congress has not acted.³

"The complete answer to those suggestions is that in the matter now before the court, Congress has acted. The question now for consideration is not as to the power of the States relating to commerce, as held in *Smith v. Alabama*,⁴ upholding a State statute requiring a locomotive engineer, even though operating an interstate train, to submit to tests for color blindness.⁵

"The question here is as to the power of Congress over articles of interstate commerce, even though such articles in the end become subject to State statutes. No one doubts but that wheat and flour, as well as all articles of food, are subjects of commerce, and when carried over and across State lines, are subject to be regulated by Congress. And it is no answer to say, that when adulterated, or wrongly labeled, because in the end they will fall under a State statute, that they when being shipped can not be covered by a Congressional enactment. The liquor cases illustrate this. Because of all the subjects of commerce there is no one thing more peculiarly and distinctly and appropriately subject to regulation by the State even to the extent of prohibition than are intoxicating liquors. And yet Congress legislates with reference to liquors. The Wilson Act of 1890 provided that when liquors arrived in a State they should be subject to State laws. This statute was upheld in the case of *In re Rahrer*,⁶ thereby modifying the practical effect of the holding in *Leisy v. Hardin*,⁷ that the State could not interfere by

³ *Sherlock v. Alling*, 93 U. S. 99, 23 L. Ed. 819, affirming 44 Ind. 184.

⁴ 124 U. S. 463, 31 L. Ed. 508, 8 Sup. Ct. 564, affirming 76 Ala. 69.

⁵ "The power of Congress to pass the statute is derived solely from its authority to regulate commerce, and it must have uniform operation throughout the United

States. It deals with articles of food which enter into interstate commerce." N. J. 990.

⁶ 140 U. S. 545, 11 Sup. Ct. 865, 55 L. Ed. 572, reversing 43 Fed. 566, 10 L. R. A. 555.

⁷ 135 U. S. 100, 10 Sup. Ct. 681, 34 L. Ed. 128, reversing 78 Iowa 286, 43 N. W. 188.

legislation as to liquors shipped interstate as long as the liquors were in the original packages. While in *Rhodes v. Iowa*,⁸ it was held that the liquors must be in fact and actually delivered to the purchaser before the State laws became effective as to such interstate shipment. No one should doubt but that legislation by Congress can control the interstate subject of commerce for a time at least, and then the State by a police regulation can control. If liquors do not sufficiently illustrate the question, lottery tickets will. The Louisiana Lottery was conducted by men of high repute and much renown. But it became a national scandal. It was struck at by denying it the use of the mails. The Legislature of the State gave it encouragement; even its life. But Congress provided in addition that it should be a crime to carry lottery tickets from one State to another by means other than through the mails. Can any person doubt but that the Louisiana Lottery was or could have been made subject to the laws of Louisiana? And yet this Congressional enactment was upheld in the *Lottery Case*.⁹ But little need be said of that case. It was argued by counsel of great eminence. It was argued upon two separate occasions. It received the fullest consideration by the Supreme Court. Apparently no other case that was ever before that court received more attention and fuller consideration. Counsel for complainants herein concede all these things. And the only answer that has been made, or that can be made to that case, is in the statement that the case was decided by a divided court, four justices dissenting. It may be, or it may not be, that that weakens the case as an authority. It is barely possible, that later on, that court changing as to its personnel, the decision may be overruled. But such reasoning is a mere speculation. On the other hand, the fact that the court was so divided emphasizes the fact that the court gave great consideration to the question. But be these things as they may, it is not for this court to usurp the prerogative

⁸ 170 U. S. 412, 18 Sup. Ct. 664,
42 L. Ed. 1088, reversing 99 Iowa
496, 58 N. W. 887, 24 L. R. A. 245.

⁹ 188 U. S. 321, 23 Sup. Ct. 321,
47 L. Ed. 492.

by blindly declining to follow that decision. That decision stands, and as long as it stands, it is the law of the country, and this court not only must, but does cheerfully observe it in all its phases. Much more could be said. Cases commencing with *Gibbons v. Ogden*,¹⁰ and then to date, could be reviewed. The question could be illustrated in many ways. But all that would be to no purpose: it would be academic. Congress has enacted a safety appliance law for the preservation of life and limb. Congress has enacted the anti-trust statute to prevent immorality in contracts and business affairs.

"Congress has enacted the live stock sanitation Act to prevent cruelty to animals.

"Congress has enacted the cattle contagious disease Act to more effectively suppress and prevent the spread of contagious and infectious diseases of live stock.

"Congress has enacted a statute to enable the Secretary of Agriculture to establish and maintain quarantine districts.

"Congress has enacted the meat inspection Act.

"Congress has enacted the employers' liability Act.

"Congress has enacted the obscene literature Act.

"Congress has enacted the lottery statute above referred to.

"Congress has enacted (but a year ago) statutes prohibiting the sending of liquors by interstate shipment with the privilege of the vendor to have the liquors delivered c. o. d., and to prohibit shipments of liquors except when the name and address of the consignee and the quantity and kind of liquor is plainly labeled on the package.

"These statutes, police regulations in many respects, are alike in principle to the Act of June 30, 1906, under consideration. Can it be possible they are all void? This statute by its title, and by its very provision plainly shows that it is with reference to commerce, and that it is not with reference to local police regulations. It is also contended that so much of Section 7 of the statute as relates to food is void because no standard has been fixed. That argument is made

¹⁰ 9 Wheat. 1 6 L. Ed. 23, reversing 17 Johns 488.

because drugs are fixed by a standard recognized by the United States Pharmacopoeia or National Formulary, and as to confectionery a standard is fixed by declaring what confectionery shall not contain. Whereas as to foods no standard has been fixed. It is a fact most obvious that no standard could be fixed other than was done by Congress. The one provision as to food is, that it shall not be mixed so as to reduce or lower or injuriously affect its quality or strength. Another provision is that some substance shall not be substituted wholly or in part for the article. Another provision is that no valuable constituent of the article shall be abstracted. Another provision is that it shall not be mixed, colored, powdered, coated, or stained in a manner whereby damage or inferiority is concealed. Another provision is that poisonous or other deleterious ingredients shall not be added. Still another provision is that filthy, decomposed, or putrid substances shall not be added. And so on more in detail than herein enumerated. These provisions present questions of fact as to every alleged contraband article. This objection is without merit."¹¹

Section 9 of the Act concerning guaranty of food products is not unconstitutional as applied to a wholesaler who sells adulterated or misbranded goods within the State to a dealer under a guaranty of conformity to the pure food and drug statute, with knowledge that such guaranty is exacted to further the sale of goods in interstate commerce, they having been actually shipped out of the State by the dealer relying on the guaranty.¹²

¹¹ *Shawnee Milling Co. v. Temple*, 179 Fed. 517; *Notice of Judgment* 497; *United States v. Seventy-four Cases of Grapejuice*, 181 Fed. 629. See also *The Lottery Cases*, 188 U. S. 321, 23 Sup. Ct. 321, 47 L. Ed. 492.

The statute is not void because no standard of food is fixed by it. That is left to the courts under proper pleading and the evidence.

United States v. Four hundred and Twenty Sacks of Flour, 180 Fed. 518; *United States v. Two Barrels of Dessicated Eggs*, 185 Fed. 302. On the point in this note see also *Kench v. O'Sullivan*, 20 N. S. W. L. R. 353, 16 W. N. (N. S. W.) 137.

¹² *United States v. Charles L. Heine Specialty Co.*, 175 Fed. 299. There is a mere allusion to the

§ 88. An Original Package—Broken Package.

To constitute an offense under this statute, so far as relates to an offense committed within a State, the adulterated or misbranded food or drug must be delivered to another person in the original unbroken package as it came from another State or Territory or District of Columbia, or from a foreign country. If the package be broken, and then a part of its contents be delivered to another person, no offense is committed against the provisions of this Federal statute. It then becomes important to inquire "what is an original unbroken package?" The question has been answered by No. 2 of the rules and regulations for the enforcement of this Act, adopted by the Secretary of the Treasury, the Secretary of Agriculture and the Secretary of Commerce and Labor, which is as follows: "The term 'original unbroken package' as used in this Act is the original package, carton, case, can, box, barrel, bottle, phial, or other receptacle put up by the manufacturer, to which the label is attached, or which may be suitable for the attachment of a label, making one complete package of the food or drug article. The original package contemplated includes both the wholesale and the retail package." It may be noted that within the second section of the Act the term "original unbroken package" is used, while in the third section the term used is "unbroken package." For the purpose of determining what is an "original unbroken package" or an "unbroken package" we can not resort to the common and popular understanding of these words, for the reason that they have received a special meaning and import when applied to the state of interstate and

constitutionality of a proposed change of the statute with respect to a rule prohibiting dishonest puffing of the curative properties of medicines in *Hipolite Egg Co. v. United States*, 219 U. S. —, 31 Sup. Ct. 364, 55 L. Ed. —, and Judge Phillips has also spoken of the limit of Congressional powers

and the extent to which they had been used in the enactment of the Pure Food and Drugs Act of June 30, 1906.

That the Act of 1903 authorizing the Secretary of Agriculture to adopt standards of food is constitutional, see opinion of Judge Hollister. N. J. 823.

foreign commerce through numerous judicial decisions upon the commerce clause of the Federal Constitution. In that special sense they were employed in this statute. As used in this connection they are of restricted import. The word "original package" was used for the first time in 1827. In many subsequent cases no modification was made in the term. But in the statute under discussion the word "unbroken" has been added in sections two and ten; and in section three this word has been substituted for the word "original," without qualifying effect, just as the courts have used the words "unbroken" and "original" as synonymous. It may therefore be considered that their combination or substitution effects no change in significance.¹

The National Board of Food and Drug Inspection, in a lengthy opinion, which has been approved by the Secretary of Agriculture, and in which many cases have been examined, restrict these words as used in this Act "to such a package containing the food and drug product as has been prepared for shipment or transportation and shipped or transported, as an entirety or unit, from a State, Territory, or the District of Columbia, or a foreign country, into another State, Territory, or the District of Columbia, and delivered to the consignee, remaining his property in the identical form and condition in which it was shipped or transported. After arrival in a State," it is said, "and delivery to the consignee, if any part of the contents of the package be removed, or if the package be opened and commingled with other property, or if the package be transferred by the consignee, it is no longer an original package. The retail package is not an original package unless it bears the characteristics set forth above."² The Supreme Court of the

¹ Consult *Low v. Austin*, 13 Wall. 29, 20 L. Ed. 517, and *United States v. Fox*, Fed. Case No. 15155.

² F. I. D. 86. "It is not practicable to form a universally accurate and satisfactory definition of an 'original package.' No stat-

ute has done so, and the Department disclaims any attempt to do so in its construction of the terms. The question must be determined largely upon each case as it arises, with the guidance of the authoritative decisions of the courts."

United States has held that "original packages are such as are used in bona fide transactions carried on between the manufacturer and wholesale dealer residing in different States."³ This is that court's first definition of an original package. It is scarcely an accurate test to determine what is an original package in every case; and certainly does not restrict that term as used in the food and drugs Act to transactions wholly between the manufacturer and wholesale dealer. If this be so, then the plain intent of the Act could be very easily defeated in the case of sales by importers in original packages. Take as an illustration the shipment of a can of corn by a person in no way connected with the manufacture or preparation of canned corn, from one State to a person in another State in no way engaged in the general sale of such commodities. This is a shipment and receipt of an original package; and if the recipient disposes of it in any way, in the form in which it comes to him, he has violated the food and drugs Act, although the definition quoted above does not fully cover such a transaction. A more accurate definition is one given by one of the Circuit Courts. "An original package," said the court, "within the meaning of the law of interstate commerce, is the package delivered by the importer to the carrier at the initial point of shipment, in the exact condition in which it was shipped."⁴ The size of the package has little to do with the question, and in one case it was said that "It is not perceived why, in the absence of a regulation by Congress to the contrary, the importer may not determine for himself the form and size of the package he puts up for export."⁵

³ *Austin v. Tennessee*, 179 U. S. 343, 21 Sup. Ct. 132, 45 L. Ed. 244 affirming 101 Tenn. 563, 50 L. R. A. 478, 70 Am. St. 703, 48 So. 305.

⁴ *Guckenheimer v. Sellers*, 81 Fed. 997.

⁵ *In re Beine*, 42 Fed. 545.

In speaking of the right of an importer to sell foods in the original package when no Federal stat-

ute prohibited such sale, although a State statute attempted to do so, the Supreme Court has said: "The right of the importer to sell can not depend upon whether the original package is suitable for retail trade or not. His right to sell is the same whether to consumers or to wholesale dealers in the article, provided he sells them in the orig-

Let us take some concrete examples of original packages, as they have come under the consideration of the Federal Courts. Thus it has been held that a barrel of gin shipped from one State to another is an original package;⁶ so a barrel of beer;⁷ one-fourth barrel of beer; one-eighth barrel of beer; a sealed case of beer;⁸ ten and forty pound tubs of oleomargarine;⁹ a box of liquors;¹⁰ a box, case or bale in which were enclosed separate bundles and packages of dry goods;¹¹ a large open basket in which were shipped numerous pasteboard boxes each containing ten cigarettes;¹² a ten-pound package of oleomargarine;¹³ a single bottle of beer or whisky, packed, sealed and nailed up in a pasteboard or wooden box;¹⁴ a ten-pound tub of oleomargarine even though its lid had been removed to allow its inspection by the purchaser;¹⁵ a small wooden box containing twelve and a half ounces of oil, even though its top had been removed by the seller to permit the purchaser to inspect the contents;¹⁶ a single bottle of beer if shipped singly. Several bottles of beer fastened together and so shipped constitute one package; if several bottles be inclosed in one box, barrel, crate, or other receptacle, the

inal packages." *Schollenberger v. Pennsylvania*, 171 U. S. 1, 18 Sup. Ct. 757, 43 L. Ed. 49, reversing 170 Pa. 284, 30 L. R. A. 396, 33 Atl. 82, 5 Inters. Com. Rep. 506, 170 Pa. 296, 33 Atl. 85.

⁶ *Peirce v. New Hampshire* 5 How. 504, 12 L. Ed. 256, affirming 13 N. H. 536, 1 R. J. 193, 24 Pick. 374.

⁷ *Bowman v. Chicago, etc., Ry. Co.*, 125 U. S. 465, 8 Sup. Ct. 689, 1062, 31 L. Ed. 700.

⁸ *Leisy v. Hardin*, 135 U. S. 100, 10 Sup. Ct. 681, 34 L. Ed. 128, reversing 78 Iowa 286, 43 N. W. 188.

⁹ *Schollenberger v. Pennsylvania*, *supra*.

¹⁰ *Rhodes v. Iowa*, 170 U. S. 412, 18 Sup. Ct. 664, 42 L. Ed. 1088,

reversing 90 Iowa 496, 24 L. R. A. 245, 58 N. W. 887.

¹¹ *May v. New Orleans*, 178 U. S. 496, 20 Sup. Ct. 976, 44 L. Ed. 1165, affirming 51 La. Ann. 1064, 25 So. 959.

¹² *Austin v. Tennessee*, 179 U. S. 343, 21 Sup. Ct. 132, 45 L. Ed. 224, affirming 101 Tenn. 563, 50 L. R. A. 478, 70 Am. St. 703, 48 S. W. 305.

¹³ *Plumley v. Massachusetts*, 155 U. S. 461, 15 Sup. Ct. 154, 39 L. Ed. 223, affirming 156 Mass. 226, 15 L. R. A. 839, 30 N. E. 1127.

¹⁴ *In re Beine*, 42 Fed. 545.

¹⁵ *In re McAllister*, 51 Fed. 282.

¹⁶ *United States v. Fox*, Fed. Case No. 15155.

box, barrel, crate, or other receptacle is the original package.¹⁷ Where each bottle of whisky was wrapped in paper and sealed, and then a number of them were closely packed in uncovered wooden boxes furnished by an express company, and these boxes were marked "to be returned," and in that condition were shipped from one State to another, it was held that the boxes and not the bottles were the "original packages."¹⁸ It makes no difference in such an instance that each bottle is labeled an "original package."¹⁹ Where bottles were each labeled "original package," and in that condition delivered to the carrier, and the carrier without the shipper's knowledge, put the bottles into a box and then shipped them, it was held that each bottle was an original package and not the box.²⁰ Where beer and whisky were put up in sealed bottles in one State and shipped in boxes and barrels for convenience by the owner to its agent in another State to sell; and he removed the bottles and sold them singly, without breaking the seals, to customers who were not allowed to open them and drink the contents on the premises, it was held that each bottle was an original package.²¹ But this decision was distinguished by a State court in a case where a saloon keeper thus imported liquors in bottles, sold the bottles over his bar to his customers who

¹⁷ *Guckenheimer v. Sellers*, 81 Fed. 997.

¹⁸ *In re Harmon*, 43 Fed. 372. See also *Keith v. State*, 91 Ala. 2, 8 So. 353, 10 L. R. A. 430; *Harrison v. State*, 91 Ala. 62, 10 So. 30; *Haley v. State*, 42 Neb. 556, 60 N. W. 962, 47 Am. St. 718; *State v. Chapman*, 1 S. D. 414, 47 N. W. 411, 10 L. R. A. 432; *State v. Parsons*, 124 Mo. 436, 27 S. W. 1162, 42 Am. St. 457.

¹⁹ *Keith v. State*, 91 Ala. 2, 8 So. 353, 10 L. R. A. 430.

²⁰ *Tinker v. State*, 96 Ala. 115, 11 So. 383.

²¹ *Leisy v. Hardin*, 135 U. S. 100,

10 Sup. Ct. 681, 34 L. Ed. 128. See also *State v. Coonan*, 82 Iowa 400, 48 N. W. 921; *Collins v. Hills*, 77 Iowa 181, 41 N. W. 571, 3 L. R. A. 110; *State v. Winters*, 44 Kan. 723, 25 Pac. 235, 10 L. R. A. 616 (this case overrules *State v. Fulker*, 43 Kan. 237, 22 Pac. 1020, 7 L. R. A. 183); *May v. Orleans*, 178 U. S. 496, 20 Sup. Ct. 976, 44 L. Ed. 1165, affirming 51 La. Ann. 1064, 25 So. 959; *State v. Miller*, 86 Iowa 638, 53 N. W. 330. The case of *Smith v. State*, 54 Ark. 248, 15 S. W. 882, in view of *Leisy v. Hardin*, *supra*, is not an authority.

destroyed the seals, drew the corks, poured the contents into glasses on the bar furnished by him, drank the contents of the glass and left the bottle on the bar. This was held not a sale of an original package.²² Yet in a subsequent case in the same State it was held that where a person receiving the bottles was the agent of the shipper, and he removed the bottles from the boxes, delivered them with a corkscrew and glasses to the purchasers, and allowed them to open the bottles and drink the contents on the premises, the transaction was a sale of an original package, and not a violation of the State laws.²³ The right to draw the bung of the cask and sample the contents to see if it corresponds with the representation, and to return the cask if it does not, will not destroy the cask as an original package.²⁴ Where dry goods were imported into New Orleans from a foreign country in boxes, bales and cases, each containing separate bundles of merchandise, separately marked, which were so exposed for sale or taken out of the boxes, bales and cases and sold, it was held that the boxes, bales and cases were the original packages, and when the separate bundles were removed or exposed for sale they were not original packages.²⁵

The Legislature of Tennessee in 1897 passed an Act to prohibit the sale of any cigarettes or introduction of them into the State for that purpose. Austin was a merchant in the State and in the course of his business purchased from a factory in North Carolina a number of packages of cigarettes put up in small boxes, containing ten cigarettes each,

²² *Hopkins v. Lewis*, 84 Iowa 690, 51 N. W. 255, 15 L. R. A. 397, distinguishing *Collins v. Hills*, 77 Iowa 181, 41 N. W. 571, 3 L. R. A. 110. See also *State v. Parson*, 102 Mo. 436, 27 N. W. 1102, 46 Am. St. 457.

²³ *State v. Miller*, 86 Iowa 638, 53 N. W. 330.

²⁴ *Wind v. Iler & Co.*, 93 Iowa 316, 61 N. W. 1001, 27 L. R. A. 219; *United States v. Five Boxes*

of Assafoetida, 181 Fed. 561; *McCarty v. Gordon*, 16 Kan. 35; *Schlesinger v. Stratton*, 9 R. I. 578; *Mach v. Lee*, 13 R. I. 293; *Gill v. Kaufman*, 16 Kan. 571; *Snider v. Koeller*, 17 Kan. 422, *supra*. *Wasserboehr v. Boulier*, 84 Me. 165, 24 Atl. 808, 30 Am. St. 344.

²⁵ *May v. New Orleans*, 178 U. S. 496, 20 Sup. Ct. 976, 44 L. Ed. 1165, affirming 51 La. Ann. 1064, 25 So. 959.

there being securely pasted over the end of each box a United States revenue stamp. When the order was received by the North Carolina factory, the packages above described were placed in a pile on the floor of their warehouse and the agent of the Southern Express Company notified to come for them. An employee of the company brought with him a large basket without cover, belonging to his company, in which he gathered the individual boxes and took them to the station for carriage to Austin, in Tennessee. When the basket containing the packages reached its destination in Tennessee, the agent of the company there took it to Austin's store and emptied the packages on the counter of the store and took the basket away with him. Austin immediately exposed the cigarettes for sale and sold one package to a customer. He was indicted, tried and convicted for this sale. His defense was that the package sold was an original package, and that the law of the State so far as applicable to this transaction was unconstitutional as an interference with interstate commerce. Upon appeal to the Supreme Court of the State the conviction was affirmed. He then sued out a writ of error to the Supreme Court of the United States. A majority of the Justices held that the original package in this case was the basket in which the packages were transported, and not the package sold. They therefore affirmed the judgment of the State court. The results of the conclusions reached are expressed in the syllabus, as follows: "Original packages are such as are used in bona fide transactions carried on between the manufacturer and wholesale dealers residing in different States. Where the size of the package is such as to indicate that it was prepared for the purpose of evading the law of the State to which it is sent, it will not be protected as an original package against the police laws of that State." The court rested its decision in this case more upon the palpable fraud upon the laws of Tennessee than upon any attempt to analyze the definition of an original package, and held the package of cigarettes not an original package. So in *Cook v. Mar-*

shall County,²⁶ the boxes of cigarettes in the same form as in the Austin case were shoveled into the car in Missouri and delivered to Cook in Iowa in that condition. They were not inclosed in any receptacle, but shipped in bulk. The State imposed a tax of \$300 on the business of selling cigarettes. Cook resisted the payment upon the ground that he sold only in original packages and was therefore protected by the interstate commerce clause of the Constitution. Having lost in the State courts, he prosecuted a writ of error to the Supreme Court of the United States, where it was held that Cook was not exempt from the tax; that the manner of dealing disclosed by the facts in the case was a gross fraud upon the laws of Iowa, and the court would not lend its aid to such a proceeding. The question of what was an original package in the case was a matter of minor importance, though the court said the term original package did not include packages which could not be commercially transported from one State to another. The syllabus contains the law, as follows: "The term original package is not defined by statute, and while it may be impossible to judicially determine its size or shape, under the principle upon which its exemption while an article of interstate commerce is founded, the term does not include packages which can not be commercially transported from one State to another. While a perfectly lawful act may not be impugned by the fact that the person doing it was impelled thereto by a bad motive, where the lawfulness or unlawfulness of the act is made an issue, the intent of the actor may be material in characterizing the transaction, and where a party, in transporting goods from one State to another, selects an unusual method for the express purpose of evading or defying the police laws of the latter State the commerce clause of the Federal Constitution can not be invoked as a cover for fraudulent dealing. This court adheres to its decision in *Austin v. Tennessee*,²⁷ that small pasteboard boxes each containing

²⁶ 196 U. S. 261, 25 Sup. Ct. 233,
49 L. Ed. 471, affirming 119 Iowa
384, 104 Am. St. 283, 93 N. W.
372.

²⁷ 179 U. S. 343, 21 Sup. Ct. 132,
45 L. Ed. 224.

ten cigarettes, and sealed and stamped with the revenue stamp, whether shipped in a basket or loosely, not boxed, baled or attached together, and not separately or otherwise addressed but for which the express company has given a receipt and agreement to deliver them to a person named therein in another State, are not original packages and are not protected under the commerce clause of the Federal Constitution from regulation by the police power of the State." From a consideration of all the decisions and upon the basis of common understanding of the words, it seems that an original package within the meaning of the food and drugs Act is the unit, complete in itself, delivered by the shipper to the carrier, addressed to the consignee, and received by him in the identical condition in which it was sent, without separation of the contents in any manner. This unit may be a hogshead containing 500 bottles of wine, or a single can of tomatoes, or it is a small ounce phial of some drug if shipped to the consignee in that form; and if the consignee sells or gives away any one of the three in the unaltered condition in which he received it, if the contents be adulterated or misbranded, he has violated the Act.

This presentation of the decisions of the courts would not be complete, and certainly not satisfactory, if some reference were not made to three very important decisions, two of the Supreme Court of the United States,²⁸ and one of the Circuit Court of Appeals of the Sixth Circuit.²⁹ But they are referred to here simply to show that, so far as the food and drugs Act of June 30, 1906, is concerned, they are in a sense obsolete. These decisions were rendered prior to the passage of the aforesaid Act, and asserted the right of the States to prohibit the sale and traffic in adulterated and misbranded foods and drugs even in original packages. They were rendered in the absence of Congressional action covering the

²⁸ *Plumley v. Massachusetts*, 155 U. S. 461, 15 Sup. Ct. 154, 39 L. Ed. 223, affirming 156 Mass. 236, 15 L. R. A. 839, 30 N. E. 1127;

24 Sup. Ct. 234, 48 L. Ed. 40, affirming 171 N. Y. 329, 98 Am. St. 599, 63 N. E. 1097.

²⁹ *Arbuckle Bros. v. Blackburn Crossman v. Lurman*, 192 U. S. 189, Dairy Food Co., 113 Fed. 616.

entire subject matter of interstate commerce in foods and drugs. Since then Congress has assumed its full authority over the subject by the passage of the Act of June 30, 1906.

The decisions proceeded upon the well recognized principle that in the absence of complete Federal regulation of interstate and foreign commerce effect will be given to the legitimate exercise of the police powers of the States, even though incidentally affecting that commerce. There can scarcely be a doubt that since the enactment of the food and drugs Act all power of the States over interstate commerce in foods and drugs, including the regulation of importations and sales in original packages, has been abrogated, and the subject is entirely and exclusively under the control of the Federal government. That such is the state of the law is clearly and succinctly shown by the following quotation from the opinion of Justice Harlan in the case of *Reid v. Colorado*:⁸⁰

"It is quite true, as urged on behalf of the defendant, that the transportation of live stock from State to State is a branch of interstate commerce and that any specified rule or regulation in respect of such transportation, which Congress may lawfully prescribe or authorize and which may properly be deemed a regulation of such commerce, is paramount throughout the Union. So that when the entire subject of the transportation of live stock from one State to another is taken under direct national supervision and a system devised by which diseased stock may be excluded from interstate commerce, all local or State regulations in respect of such matters and covering the same ground will cease to have any force, whether formally abrogated or not; and such rules and regulations as Congress may lawfully prescribe or authorize will alone control. . . . The power which the States might thus exercise may in this way be suspended until national control is abandoned and the subject be thereby left under the police power of the States." This case involved the validity of a certain Act of the State of Colorado designed to prevent the introduction of infectious and con-

⁸⁰ 187 U. S. 137, 47 L. Ed. 108, 23 Sup. Ct. 92.

tagious diseases among the cattle of the State. The defendant contended that the Act was void as an interference with interstate commerce, and because the subject matter had already been covered by an Act of Congress. The Supreme Court sustained the validity of the act of Colorado, because a legitimate exercise of the police power in the absence of complete regulation by Congress covering the matter. The Act in force at that time did not attempt a full and complete regulation of interstate transportation of animals. In a recent case the United States District Court for the Northern District of West Virginia considered at some length the meaning of the words "original package." The defendant was a corporation and had its warehouse and laboratory and finishing department at Wheeling in the State of West Virginia. It was the proprietary of a preparation for the hair which it marketed in bottles of three, six and twelve ounces, under the trade name of "Danderine," the formula of which was a trade secret and comprised liquid extracts and other ingredients. Manufacturing pharmacists at Detroit, Michigan, contracted with the defendant to compound this formula and to cause it to be transported and delivered in bulk in carloads at the corporation's warehouse in West Virginia. The liquid was put in casks made of wood bound with iron hoops. Each cask held fifty gallons of liquid, and when emptied were returned to the pharmacists to be again refilled and re-shipped as before. There were sixty-five of them. All of these casks were marked in the same manner, with the exception that the figures, some of which showed the number of gallons contained therein, and others of the number of casks, were marked in the same manner when shipped, and were marked wholly upon one end of the cask. There were no other marks on them. It was claimed that the car in which these casks were shipped was the "original package," and not each cask. But the court held that each cask was an original package, saying: "The term 'original package' as employed by law, admits of no precise definition applicable to all. Generally it is said to be a parcel, bundle, bale, box, or can made up of or packed with some commodity with

a view to its safety and convenient handling and transportation. It does not necessarily mean that goods shall be inclosed in a tight or sealed receptacle. It relates wholly to goods as prepared for transportation, and has no necessary reference to the package originally prepared or put up by the manufacturer. Indeed, the idea of the 'original package' may well be made to cover certain forms of property which do not ordinarily admit of being packed or incased in any other manner than in the car or vessel in which they are transported, such, for instance, as steel beams, threshing machines, and other bulky articles.³¹ This definition has been quoted as being the most favorable I have found to the contention of respondent in this case.³² Without prolonging the discussion, it seems to me clear that in this case the cask is the 'original package,' for the very simple reason that the car was wholly incompetent to 'package' the liquid itself; the cask was a complete entity of itself, not connected or bound up with any other article, but capable of and in fact containing some fifty gallons of this liquid, an amount capable thereby of being safely and conveniently handled and transported; each cask was marked to the consignee, and if separated from the car was capable of shipment independent thereof without either loss or inconvenience; the casks were shipped independently from Detroit to Sandusky by vessel, and then transferred to the car for shipment to Wheeling, their final destination."³³

§ 89. Extent of Power of Congress over Food and Drugs Made Subjects of Interstate Commerce.

It is advisable here to consider the extent of the power of

³¹ Citing *Cook v. Marshall County*, 119 Iowa 384, 93 N. W. 372, 104 Am. St. 283.

³² "Many others have been carefully collected in 6 Words and Phrases 5059, and the terms have been fully discussed in *Austin v. Tennessee*, 179 U. S. 343, 21 Sup. Ct. 132, 45 L. Ed. 224."

³³ *United States v. Knowlton Danderine Co.*, 170 Fed. 449 (F. I. D.) But see *United States v. Hipolite Egg Co.*, N. J. 508.

To open a package in order to test its contents does not destroy it as an original package. *United States v. Five Boxes of Assafoetida*, 181 Fed. 561.

Congress over food and drugs transported into a State from another State or Territory, the District of Columbia, or a foreign country, and those remaining. And it may be stated that the control of Congress over food and drugs, so transported, continues, after their arrival in the State, so long as they are in the original package.

In *Brown v. Maryland*¹ it was decided that the law of Maryland imposing a license tax upon all importers of foreign articles, dry goods, and merchandise by bale or package, and upon other persons selling the same, was unconstitutional so far as it undertook to require such license tax from an importer of goods from a foreign country for the sale thereof in the original packages in which they were imported; and that such a tax was an interference with foreign commerce, which, under the Constitution of the United States, was committed to Congress to regulate. The conclusion of the court is contained in the following syllabus: "An Act of a State Legislature, requiring all importers of foreign goods by the bale or package, etc., and other persons selling the same by wholesale, bale, or package, etc., to take out a license, for which they shall pay \$50, and in case of neglect or refusal to take out such license, subjecting them to certain forfeitures and penalties, is repugnant to that provision of the Constitution of the United States which declares that 'no State shall, without the consent of Congress, lay any impost or duty on imports or exports, except what may be absolutely necessary for executing its inspection laws;' and to that which declares that Congress shall have power 'to regulate commerce with foreign nations, among the several States, and with the Indian tribes.'" The goods in this case were imported from a foreign country, but the court said: "It may be proper to add, that we suppose the principles laid down in this case, to apply equally to importations from a sister State."

This dictum was afterwards affirmed as law in the case of *Leisy v. Hardin*,² decided in 1899, which overruled *Pierce v.*

¹ 12 Wheat. 419, 6 L. Ed. 678.

34 L. Ed. 128, reversing 78 Iowa

² 135 U. S. 100, 10 Sup. Ct. 681, 286, 43 N. W. 188.

New Hampshire,³ decided subsequently to *Brown v. Maryland*. In *Peirce v. New Hampshire* it was held that a barrel of gin shipped from Massachusetts to New Hampshire was subject to the law of New Hampshire prohibiting the sale of gin, so as to render the seller amenable to the law for the sale of the barrel in the exact condition in which he received it. In the case of *Waring v. The Mayor*,⁴ decided in 1868, the Supreme Court held that sacks of salt brought into Mobile Bay from England and sold to a merchant in Mobile City after arrival of the vessel in the bay, twenty-five miles from the city, and transported by the merchant's lighters to Mobile, were subject to taxation by the city. The sacks had been sold by the importer after their arrival in Alabama, and hence were merged in the general mass of property in the State and were no longer under the shelter of the commerce clause of the Constitution when taxed by the city of Mobile. In 1871 the question of taxation of imports from foreign countries in the original packages came again before the Supreme Court in the case of *Low v. Austin*,⁵ and it was there held: "Goods imported from a foreign country, upon which the duties and charges at the custom house have been paid, are not subject to State taxation whilst remaining in the original cases, unbroken and unsold, in the hands of the importer, whether the tax be imposed upon the goods as imports, or upon the goods as part of the general property of the citizens of the State, which is subjected to an ad valorem tax." It will be seen that the court here uses the expression "original cases, unbroken and unsold." In *Cook v. Pennsylvania*,⁶ decided in 1878, the same court held a tax imposed by the law of the State upon every auctioneer on the amount of his sales invalid when applied to the sale of imported goods in original packages. It also held that: "The statute of Pennsylvania of May 20, 1853, modified by that of April 9, 1859, requiring every auctioneer to collect and pay into the State

³ 5 How. 504, 12 L. Ed. 256, affirming 24 Pick. 374, 1 R. I. 193, 13 N. H. 536.

⁴ 8 Wall 110, 19 L. Ed. 342, affirming 41 Ala. 139.

⁵ 80 U. S. 29, 43 L. Ed. 1181.

⁶ 97 U. S. 566, 24 L. Ed. 1015.

treasury a tax on his sales, is, when applied to imported goods in the original packages, by him sold for the importer, in conflict with sections 8 and 10 of article 1 of the Constitution of the United States, and therefore void, as laying a duty on imports and being a regulation of commerce." In *Schollenberger v. Pennsylvania*,⁷ an Act of the State of Pennsylvania prohibiting the sale of any oleaginous substance or compound of the same designed to take the place of butter was held unconstitutional so far as attempted to be enforced in the case of a sale of a forty-pound tub of oleomargarine imported from Rhode Island and sold as oleomargarine in the identical condition in which imported. The law of the case is contained in the following syllabus: "Act No. 21 of the Legislature of Pennsylvania, enacted May 21, 1885, enacting that 'no person, firm or corporate body shall manufacture out of any oleaginous substance, or any compound of the same, other than that produced from unadulterated milk or of cream from the same, any article designed to take the place of butter or cheese produced from pure unadulterated milk, or cream from the same, or of any imitation or adulterated butter or cheese, nor shall sell or offer for sale, or have in his, her or their possession with intent to sell the same as an article of food,' and making such act a misdemeanor, punishable by fine and imprisonment, is invalid to the extent that it prohibits the introduction of oleomargarine from another State, and its sale in the original package." The right of a State to prohibit the importation of a recognized article of commerce was distinctly denied by the Supreme Court in the case of *Bowman v. Chicago and Northwestern Railway Company*,⁸ decided in 1887. In that case the court declared invalid the statute of Iowa forbidding any railway company from bringing into the State intoxicating liquors unless previously furnished with a certificate from the county auditor that the consignee was authorized to sell them. It was held

⁷ 171 U. S. 1, 18 Sup. Ct. 757, 5 Inters. Com. Rep. 506, 170 Pa. 43 L. Ed. 49, reversing 170 Pa. 296, 33 Atl. 85.
⁸ 125 U. S. 465, 8 Sup. Ct. 689, 284, 30 L. R. A. 396, 33 Atl. 82, 1062, 31 L. Ed. 700.

that "A State can not, for the purpose of protecting its people against the evils of intemperance, enact laws which regulate commerce between its people and those of other States of the Union, unless the consent of Congress, express or implied, is first obtained. Section 1553 of the Code of the State of Iowa, as amended by C. 143 of the Acts of the Twentieth General Assembly in 1886 (forbidding common carriers to bring intoxicating liquors into the State from any other State or Territory, without being first furnished with a certificate, under the seal of the auditor of the county to which it is to be transported or consigned, certifying that the consignee or person to whom it is to be transported or delivered is authorized to sell intoxicating liquors in the county), although adopted without a purpose of affecting interstate commerce, but as a part of a general system designed to protect the health and morals of the people against the evils resulting from the unrestricted manufacture and sale of intoxicating liquors within the State, is neither an inspection law, nor a quarantine law, but is essentially a regulation of commerce among the States, affecting interstate commerce in an essential and vital part, and, not being sanctioned by the authority, express or implied, of Congress, is repugnant to the Constitution of the United States."

It will be seen from the above that in this case the question of the right of the importer to sell the article so imported in the original package was not decided.

Two years later the question just stated was squarely presented to the court in the case of *Leisy v. Hardin*,⁹ where it was held that the statute of Iowa prohibiting the sale of intoxicating liquors, except for certain prescribed purposes, was, as applied to the sale by the importer, in original packages or kegs, unbroken and unopened, of liquors manufactured in and brought from another State, unconstitutional and void, as repugnant to the Constitution of the United States

⁹ 135 U. S. 100, 10 Sup. Ct. 681, 5 How. 504, 12 L. Ed. 256, affirming 34 L. Ed. 128, reversing 78 Iowa 286, 43 N. W. 188. This case overrules *Pierce v. New Hampshire*, 5

ing 24 Pick. 374, 1 R. I. 193, 13 N. H. 536.

granting to Congress the power to regulate commerce among the States. The law of the case was stated in the following syllabus: "A statute of a State, prohibiting the sale of any intoxicating liquors, except for pharmaceutical, medicinal, chemical or sacramental purposes, and under a license from a county court of the State, is, as applied to a sale by the importer, and in the original packages or kegs, unbroken and unopened, of such liquors manufactured in and brought from another State, unconstitutional and void, as repugnant to the clause of the Constitution granting to Congress the power to regulate commerce with foreign nations and among the several States."

In *Vance v. Vandercook Co.*,¹⁰ the court reaffirmed its prior decisions upon the subject. The law of interstate commerce and the relation of the original package thereto is succinctly stated in the following syllabus to the opinion: "That the right to send liquors from one State into another, and the act of sending the same, is interstate commerce, the regulation whereof has been committed by the Constitution of the United States to Congress, and hence, that a State law which denies such a right, or substantially interferes with or hampers the same, is in conflict with the Constitution of the United States. That the power to ship merchandise from one State into another carries with it, as an incident, the right in the receiver of the goods to sell them in the original packages, and State regulation to the contrary notwithstanding; that is to say, that the goods received by interstate commerce remain under the shelter of the interstate commerce clause of the Constitution, until by a sale in the original package they have been commingled with the general mass of property in the State." These decisions settled the respective rights of the Federal and State governments over

¹⁰ 170 U. S. 438, 18 Sup. Ct. 674, 42 L. Ed. 1111. See also *United States v. Knowlton Danderine Co.*, 170 Fed. 449, and *Hipolite Egg Co. v. United States*, 219 U. S. —, 31 Sup. Ct. 364, 55 L. Ed. —. The jurisdiction of the United States

over interstate shipments of adulterated food continues while the food remains in the original unbroken packages at the point of destination. *United States v. Two Barrels of Dessicated Eggs*, 185 Fed. 302.

goods moving in interstate and foreign commerce. It was determined that a State could not prevent the introduction into its territory of a recognized article of commerce; that it could not prevent the disposition by the importer in the original package of an article of commerce brought into its territory; and that Congress alone could regulate interstate commerce in such goods and the disposition of them in the original package by the importer. This is now the settled law. Hence the Food and Drugs Act asserts the right of the United States to prohibit the sale or disposition of adulterated and misbranded food and drugs imported into a State and remaining in the original package.

**§ 90. When the Power of Congress to Regulate the
Disposition of Imports Ceases.**

At what time in the existence of imports does the power of Congress to regulate their disposition cease? Stated otherwise, When does an original package cease to be such and the regulation of its disposition pass beyond the jurisdiction of the Federal government? This question was answered in general terms by the Supreme Court in *Brown v. Maryland*,¹ heretofore mentioned, as follows: "It is sufficient for the present to say, generally, that when the importer has so acted upon the thing imported that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the State."

In the case of *Low v. Austin*,² decided in 1871, it was held that "Goods imported do not lose their character as imports, and become incorporated into the mass of property of the State until they have passed from the control of the importer, or been broken up by him from their original cases."

Again in *Vance v. Vandercook Co.*,³ it was held that "Goods received by interstate commerce remain under the

¹ 12 Wheat. 419, 6 L. Ed. 678.

² 170 U. S. 238, 18 Sup. Ct. 674,

³ 13 Wall. 29, 20 L. Ed. 517.

42 L. Ed. 1111.

shelter of the interstate commerce clause of the Constitution, until by a sale in the original packages they have been commingled with the general mass of property in the State."

In the case of *Heyman v. Southern Railway Company** it was said: "In the absence of Congressional legislation goods moving in interstate commerce cease to be such commerce only after delivery and sale in the original package." From these decisions it will be seen that merchandise brought into a State is protected from State interference only so long as it remains in the original package, unbroken, and in the hands of the importer. If the importer sells the article in the identical condition and form in which imported, or if he breaks the package, it is no longer an original package, but has become merged in the mass of property in the State and subject to its laws. Let these decisions be applied to a hypothetical case under the food and drugs Act: A, a wholesale dealer in New York City, ships by express to B, in Hoboken, N. J., a box containing one dozen cans of adulterated condensed milk. B receives them into his store and shortly thereafter sells the box, just as received, to C. B in this example would be liable to the penalties prescribed by the Act, because he is the importer and sold the original package. But, should C, in due course, sell this identical box to D in Hoboken, he could not be successfully prosecuted under the Act because he is not the importer. When the box was sold by B it lost the character of an original package and became merged in the property of the State, and the State can only regulate its disposition by C. Suppose B, after receipt of the box, opens it and removes a can of the milk, which he sells to C. B is exempt from prosecution under the food and drugs Act for the sale of this can or for a subsequent sale of the remaining eleven, even though he sells the eleven in the box. By this act of removing one can he has broken the original package and in consequence destroyed the jurisdiction of the United States over it and over him. But suppose B simply removes the top of the box to

* 203 U. S. 270, 27 Sup. Ct. 104, 51 L. Ed. 178, reversing 122 Ga. 608, 50 S. E. 342.

permit inspection, in no way disturbing the contents, replaces the top, and sells box and milk to C. Has B incurred the penalties prescribed by the food and drugs Act? Such a question has not been presented to the Supreme Court, but two cases very similar have been decided by the lower Federal Courts. The first case, *United States v. Fox*,⁵ decided in 1869, was a suit by the United States under the internal revenue Act of July 13, 1866 (14 Stat., 144), to recover the penalties therein prescribed for the sale of perfumery without affixing a proper stamp thereon. A proviso in the Act prescribed that when imported perfumery was sold in the original and unbroken package in which the bottle or other inclosure was packed by the manufacturer the person so selling should not be liable to the aforesaid penalty. Fox sold one small box containing twelve one and a half ounce bottles of hair oil and a similar but larger box containing twelve bottles of pomade. He opened both boxes so that the purchaser might examine the contents. The top of the smaller box was put on again before delivery without change of the contents. In the larger box, containing pomade, Fox, at the request of the purchaser, substituted three smaller bottles taken from the shelf of the store, and nailed up the box. In respect to the smaller box of oil the court said: "Although the top of this box was taken off by the defendant Fox, it was only for the purpose of enabling the witness Quivey to ascertain the kind and quality of its contents, and before the sale and delivery to him it was put on again, with the contents unchanged in kind or quantity. Under these circumstances the defendant must be considered as selling an unbroken package, the contents of which were not then required to be stamped." But as to the sale of the box of pomade, the court said: "The package was opened, and three bottles being taken out of it, it was sold with only the remaining nine bottles in it. This was a broken package, and so the court instructed the jury." The verdict of the jury in favor of the defendant Fox, was set aside on motion of the United States upon the ground that the package of

⁵ Fed. Case No. 15155.

pomade was not an original package, the court holding: "Goods are sold 'in the original and unbroken package' within the meaning of the act of July 13, 1866 (14 Stat., 144), although the package is opened for inspection, if closed again before delivery without its contents being changed."

In the other case, *In re McAllister*,⁶ decided in 1892, the facts were these: Two men, emissaries of a butter dealer in Baltimore, went to the store of McAllister, a dealer in oleomargarine, and sought to buy butter. McAllister stated that he had none, but could supply oleomargarine. They requested him to remove the lid from the tub of oleomargarine that they might look at it. He did so, stating that he could not sell less than ten pounds, as it reached him in the tub from Chicago. They purchased the tub and forthwith informed on him. He was duly tried in the State court and convicted. The State Court of Appeals affirmed the conviction, and McAllister applied to the Circuit Court of the United States for a writ of habeas corpus, on the ground that the sale of the tub of oleomargarine was a sale of an original package and beyond the power of the State to prohibit, which it sought to do in an Act of the Legislature. The court granted the writ and announced the proposition of law involved, in the following syllabus to the case: "Removing the lid of an original package of oleomargarine, so that a prospective buyer may examine its contents, is not such a breaking of the package as will destroy its original character." In reaching the above conclusion the court said: "It is argued that the taking the lid from the tub containing this oleomargarine was a breaking of the package so as to destroy its original character. This in no sense did it do. The goods had in no way become commingled with his property or the general property of the State (*Low v. Austin*, 13 Wall., 29). Anyone calling for oleomargarine with an honest purpose would have purchased this package as an original one, even if he knew it had had its lid lifted off once to see whether or not it held another substance than it purported to hold. The laws of the United States recognize oleomar-

⁶ 51 Fed. 282.

garine as a merchantable article. Being such, while a State may perhaps regulate its sale, it can not prohibit its importation. The statute in question does this, and is unconstitutional, and in this respect void. The petitioner is discharged." Upon the authority of these two cases, and following their reasoning, it must be concluded that B, in the last example (p. 8), is amenable to the penalties prescribed by the food and drugs Act. The first of these cases has another and important significance in connection with this decision, namely, the use of the word "unbroken" as synonymous with "original," thus substantiating the statement in the preliminary part of this discussion that the courts used the words interchangeably. An example may be profitably introduced at this point to show how far goods moving in interstate commerce may be subjected to seizure under section 10 of the food and drug Act.

A, a wholesale dealer in New York City, ships fifty barrels of flour to B in St. Louis, Mo. This flour may be seized, if adulterated or misbranded, at New York City after delivery to the carrier, or at any point along the route, and may likewise be seized in St. Louis in the hands of the carrier before delivery to B, regardless of the question of whether or not it still remains in original packages, which, in the illustration, are the barrels.

After delivery of the flour to B it may still be seized, in his hands, if it remains in the barrels (the original packages) as shipped. But if B, after delivery to him, transfers the flour to five-pound sacks, or otherwise breaks the barrels and commingles the flour with his stock of goods, the original packages have been destroyed, and it is no longer subject to seizure by the United States; nor are the barrels liable to seizure by the United States after B disposes of them to C in Missouri, even though no alteration is made in their condition.

**§ 91. Transported from One State to Another for
Manufacturing and Sale—Statute Construed.**

The second section of the food and drugs Act provides that

"Any person who shall ship or deliver for shipment from any State or Territory or the District of Columbia to any other State or Territory or the District of Columbia, or to a foreign country, or who shall receive from any other State or Territory or the District of Columbia, or foreign country, and having so received shall deliver, in original and unbroken packages, for pay or otherwise, or offer to deliver to any other person any such article so adulterated or misbranded within the meaning of this Act, or any person who shall sell or offer for sale in the District of Columbia or the Territories of the United States any such adulterated or misbranded food or drugs, or export or offer to export the same to any foreign country, shall be guilty of a misdemeanor." Section ten provides that "Any article of food, drug or liquor that is adulterated or misbranded within the meaning of this Act, and is being transported from one State, Territory, direct or insular possession of the United States, or if it be imported from a foreign country for sale, or if it is intended for export to a foreign country, shall be liable to be proceeded against in any District Court of the United States within the district where the same is found, and seized for confiscation by a process of libel for condemnation."

In one case the defendant had a warehouse, laboratory and finishing department in West Virginia, and was the proprietor of a preparation for hair which it marketed in three, six and twelve-ounce bottles, under the trade name of "Danderine," the formula of which was a trade secret and comprised liquid extracts and other ingredients. Certain manufacturing pharmacists in Detroit, Michigan, were under contract with the defendant to compound this formula and to cause the product to be transported and delivered in bulk in car lots to the defendant in West Virginia. No sale of the danderine was made to the public or any outside purchasers until the casks containing it were emptied and their contents placed in properly marked bottles. This was the practice of the defendant. Six of the casks containing the danderine were seized by the government and libel proceedings brought against them, for the reason that the product

was misbranded in not having a statement on the casks containing the product of the quantity or proportion of the alcohol contained therein. The bottles were properly labeled. It was contended that "this liquid extract was not shipped in these casks for the purpose of sale thus in bulk, but was so shipped to the owner thereof from one State to another for the purpose of bottling into small packages suitable for sale," and there was therefore no violation of the statute. The court upheld this contention.¹ But the Supreme Court of the United States has disapproved of it, holding that under similar circumstances there was a clear violation of the statute. In that case eggs were stored by the owner in St. Louis, Missouri. They were preserved in cans, but unfit for food. The owner was a corporation of the State of Illinois, having its bakery business at Peoria in that State. It procured the shipment of the eggs to itself at Peoria, and upon their receipt placed them in their store room in its bakery factory along with other bakery supplies. The eggs were intended for baking purposes, and were not intended for sale in the original unbroken packages or otherwise and were not so sold. The United States instituted libel proceedings against these eggs to secure their condemnation and confiscation. The Supreme Court held that there had been a violation of the statute and that the eggs were liable to confiscation. It carefully reviews the case cited above, but differs from it in the conclusions there reached. The court made the following quotation from one of the cases cited:² "Following the words 'having been transported' is an ellipse,—an omission of words necessary to the complete construction of the sentence. Those words are found in the preceding part of the section, and, when supplied, the clause under which this libel is found reads and means 'any article

¹ United States v. Knowlton Danderine Co., 170 Fed. 449, N. J. 284; affirmed 175 Fed. 1022, 99 C. C. A. 667.

These two cases were followed by United States v. Forty-six

Packages and Bags of Sugar, 183 Fed. 642.

² United States v. Forty-six Packages and Bags of Sugar, 183 Fed. 642.

of food, drug, or liquor that is adulterated or misbranded within the meaning of this Act, having been transported from one State . . . to another for sale, remaining unloaded, unsold, or in original unbroken packages, . . . shall be liable," etc. "It may well be considered," said the Supreme Court of the United States, "that there is no analogy between an article in the hands of its owner, or moved from one place to another by him, to be used in the manufacture of articles subject to the statute, and to be branded in compliance with it, and an adulterated article itself the subject of sale, and intended to be used as adulterated, in contravention of the purpose of the statute. A legal analogy might be insisted upon if cakes and cookies, which are the compounds of eggs and flour, which several products could be branded to apprise of their ingredients like compounds of alcohol. The object of the law is to keep adulterated articles out of the channels of interstate commerce, or, if they enter into such commerce, to condemn them while being transported or when they have reached their destination, provided they remain unloaded, unsold, or in original unbroken packages. The situations are clearly separate, and we can not unite or qualify them by the purpose of the owner to be a sale. It, indeed, may be asked, in what manner a sale? The question suggests that we might accept the condition, and yet the instances of this record be within the statute. All articles, compound or single, intended for consumption by the producers, are designed for sale, and, because they are, it is the concern of the law to have them pure. It is, however, insisted that 'the proceeding in personam authorized by the law was intended to, and no doubt is, capable of giving full force and effect to the law;' and, further, that a producer in a State is not interested in an article shipped from another State, which is not intended to be sold or offered for consumption until it is manufactured into something else. The argument is peculiar. It is certainly to the interest of a producer or consumer that the article which he receives, no matter whence it comes, shall be pure, and the law seeks to secure that interest, not only

through personal penalties, but through the condemnation of the article if impure. There is nothing inconsistent in the remedies, nor are they dependent.³ The first contention of the egg company is therefore untenable."⁴

§ 92. Goods Passed out of Interstate Commerce Before Proceedings In Rem Commenced.

A United States District Court has jurisdiction to proceed in rem under section ten of the food and drugs Act of 1906 against goods which have passed out of interstate commerce before the proceedings in rem have been commenced. Such is the decision of the Supreme Court of the United States, and in rendering its decision it used the following language:

"The statute declares that it is one 'for preventing . . . the transportation of adulterated . . . foods . . . and for regulating traffic therein;' and, as we have seen, section two makes the shipper of them criminal, and section ten subjects them to confiscation, and, in some case, to destruction, so careful is the statute to prevent a defeat of its purpose. In other words, transportation in interstate commerce is forbidden to them, and, in a sense, they are made culpable as well as their shipper. It is clearly the purpose of the statute that they shall not be stealthily put into interstate commerce and be stealthily taken out again on arriving at their destination, and be given asylum in the mass of property of the State. Certainly not, when they are yet in the condition in which they were transported to the State, or, to use the words of the statute, while they remain 'in the original, unbroken packages.' In that condition they carry their own identification as contraband of law. Whether they might be pursued beyond the original package we are not called upon to say. That far the statute pursues them, and, we think, legally pursues them, and to demonstrate this

³ Citing *The Three Friends*, 166 U. S. 1, 41 L. Ed. 897, 17 Sup. Ct. 495. *States*, 219 U. S. —, 31 Sup. Ct. 364, 55 L. Ed. —; *United States v. Two Barrels of Eggs*, 185 Fed.

⁴ *Hipolite Egg Co. v. United* 302.

but little discussion is necessary. The statute rests, of course, upon the power of Congress to regulate interstate commerce; and, defining that power, we have said that no trade can be carried on between the States to which it does not extend, and have further said that it is complete in itself, subject to no limitations except those found in the Constitution. We are dealing, it must be remembered, with illicit articles,—articles which the law seeks to keep out of commerce because they are debased by adulteration, and which punishes them (if we may so express ourselves) and the shippers of them. There is no denial that such is the purpose of the law, and the only limitation of the power to execute such purpose which is urged is that the articles must be apprehended in transit, or before they have become a part of the general mass of property of the State. In other words, the contention attempts to apply to articles of illegitimate commerce the rule which marks the line between the exercise of Federal power and State power over articles of legitimate commerce. The contention misses the question in the case. There is here no conflict of national and State jurisdictions over property legally articles of trade. The question here is whether articles which are outlaws of commerce may be seized wherever found; and it certainly will not be contended that they are outside of the jurisdiction of the national government when they are within the borders of a State. The question in the case, therefore, is: What power has Congress over such articles? Can they escape the consequences of their illegal transportation by being mingled at the place of destination with other property? To give them such immunity would defeat, in many cases, the provision for their confiscation, and their confiscation or destruction is the especial concern of the law. The power to do so is certainly appropriate to the right to bar them from interstate commerce, and completes its purpose, which is not to prevent merely the physical movement of adulterated articles, but the use of them, or rather to prevent trade in them between the States by denying to them the facilities of interstate commerce. And appropriate means to that end,

which we have seen is legitimate, are the seizure and condemnation of the articles at their point of destination in the original unbroken packages. The selection of such means is certainly within that breadth of discretion which we have said Congress possesses in the execution of the powers conferred upon it by the Constitution."¹

§ 93. Inspection of Materials and Factories.

Regulation sixteen provides that "The Secretary of Agriculture, when he deems it necessary, shall examine the raw materials used in the manufacture of food and drug products, and determine whether any filthy, decomposed, or putrid substance is used in their preparation." He can make this inspection as often as he may deem necessary. Regulation eight provides that "The factories in which proprietary foods are made shall be open at all reasonable times to the inspection provided for in regulation sixteen." These provisions rest upon a narrow base. Nowhere in the pure food and drugs Act is specific power conferred to make such inspection as these provisions provide for. And it may well be doubted if Congress could confer such power, unless it be limited to food or drugs intended for interstate or foreign commerce. Congress has no power over food and drugs manufactured and sold in the State of their manufacture; and any rule or regulation concerning the inspection of such food or drugs is not only unauthorized but void. But where it is the intention to put the food or drugs into interstate or foreign commerce a different aspect of this question is presented. If Congress has the power to authorize the analysis of food and drugs that have actually entered into interstate or foreign commerce, may it not provide for their analysis before entering into such commerce, if it is the intention of the owner to thus handle them? The difference between an analysis and an inspection, so far as the question of

¹ *Hipolite Egg Co. v. United States*, 185 U. S. 219, 31 Sup. Ct. 302.
United States v. Two Barrels of Eggs, 185 Fed. 302.
364, 55 L. Ed. —. See also *United*

power is concerned, is trifling. It seems reasonable that Congress may confer the power to analyze food and drugs intended for interstate and foreign commerce, and to inspect raw materials to be used in the manufacture of such food and drugs. If such food and drugs or the raw materials intended for their manufacture may be inspected, it would seem that Congress may authorize the inspection of the factories in which such food and drugs are prepared. The difficulty is to draw the line in the actual practice between food and drugs intended for domestic use and intended for interstate and foreign use; and to prevent the fraudulent substitution of the products designed for domestic use for that of interstate and foreign use. Regulation sixteen seems to be inaptly drawn. It attempts to confer on the Secretary of Agriculture power to "examine the raw materials used in the manufacture of food and drug products." When materials have "been used in the manufacture of food and drug products" they are no longer "raw materials;" so that this provision if literally interpreted can not be executed. It should read that "The Secretary of Agriculture, when he deems it necessary, may examine the raw materials being or to be or intended to be used in the manufacture of food and drug products." And it may be noted that the only factories to be inspected under regulation eight are only those "in which proprietary foods are made." The word "proprietary" has a distinct and well recognized meaning, and upon this question no difficulty ought to arise. The regulation, it may be noted, does not extend to the examination of pharmacies or factories where drugs are manufactured or compounded. But we repeat that no clause in the pure food and drugs Act specifically authorizes the adoption of those parts of these two rules discussed in this section.

§ 94. District of Columbia and Territories.

The term "Territory" as used in the food and drugs Act includes the insular possessions of the United States, according to section twelve of that Act. There is no question that

the provision of the Act extends to adulterated or misbranded food and drugs manufactured, sold, or offered for sale in the District of Columbia or in the Territories, as well as the exporting or offering to export therefrom such articles, irrespective of the question whether or not they are offered for sale or for export in original packages. Within this District and these Territories Congress is supreme, unhampered by any constitutional provision. Any dealer, whether at retail or wholesale, within this District or these Territories who sells or offers for sale or for export adulterated or misbranded food or drugs, or which is offered for sale under the name of another article, is liable to the penal clauses of the Act, whether such articles be sold in original packages, in bulk or in retail.

§ 95. Inspection of Material and Factories in the District of Columbia and Territories.

Regulations eight and sixteen provide for the inspection of raw materials to be used in the manufacture of food and drug products and of factories in which proprietary foods are made. These regulations apply to the District of Columbia and the Territories; and yet there is no provision of the statute that either authorizes such inspection or the adoption of such regulations. No doubt Congress has ample power to provide for such inspection within this District and these Territories, for there it is sovereign, but it has not done so.

§ 96. Stock on Hand January 1, 1907.

The food and drugs Act took effect January 1, 1907. It is now purely academic to discuss the effect of this Act upon adulterated food or drugs received before it went into effect, for few if any such now remain in the market. Its provisions apply only to adulterated foods or drugs brought into a State or Territory on or after January 1, 1907, and received by the dealer on or after that date, in original unbroken packages.¹

¹ F. I. D. 43.

§ 97. Correction of Labels on Hand January 1, 1907.

The Food and Drugs Act does not require goods or drugs on hand January 1, 1907, to be labeled, unless they be sent out of the State. When sent out of the State, if the label that had been put on the food or drugs prior to January 1, 1907, does not meet the requirements of the food and drugs Act, then a supplemental label should be used. "Any statement, however, respecting the character of the contents which is false or misleading should be corrected. The correction should secure the obliteration of the misstatement either by placing the supplemental label or paster over it or obliterating it in some other way. If the goods contain artificial color or preservative other than ordinary condimental substances (salt, sugar, vinegar, wood smoke, spices, and condiments of all kinds), that fact should appear upon the supplemental stamp or label. If any of the words required to be placed upon drugs or foods in the specific wording of the Act do not appear upon the label, such as alcohol, opium, etc., it is held that the correction must include the enumeration of these substances, as provided for in regulations twenty-eight and twenty-nine." "All articles in the hands of manufacturers, jobbers, and dealers on the 1st day of January, 1907, which are sold wholly within the State in which they are found on that date are exempt from the provisions of the Act. Thus the use of the supplemental label, stamp, or paster is required only on those articles which on or after the 1st day of January, 1907, enter interstate commerce or are offered for sale in the District of Columbia and the Territories. . . . It will be deemed sufficient if the supplemental pasters and labels are attached at the time the goods are shipped beyond the State line; that is, that they need not necessarily be attached to such article on the 1st day of January, 1907, but at any time thereafter when prepared for interstate commerce."¹

¹ F. I. D. 43, F. I. D. 78.

§ 98. Exports to Foreign Countries.

The food and drugs Act applies to goods exported from any part of the United States to a foreign country. But there is a material qualification of the Act in section two, which is as follows: "No article shall be deemed misbranded or adulterated within the provisions of this Act when intended for export to any foreign country and prepared or packed according to the specifications or directions of the foreign purchaser when no substance is used in its preparation or packing thereof in conflict with the laws of the foreign country to which said article is intended to be shipped; but if said article shall be in fact sold or offered for sale for domestic use or consumption, then this proviso shall not exempt said article from the operation of any of the other provisions of this Act." Apparently the purpose of this proviso is to permit the use in certain food products for export of preservatives which are declared deleterious under the strict rulings of the Department of Agriculture when applied to food products intended for consumption in the United States.

§ 99. Meat and Meat Products.

The regulations adopted under the food and drugs Act do not apply to domestic meat and meat food products which are prepared, transported or sold in interstate or foreign commerce under the meat inspection law. But meat and meat food products imported from foreign countries, which are not provided for under the meat inspection law, are subject to the provisions of the food and drugs Act.¹

§ 100. Imported Food.

Section eleven of the food and drugs Act relates to the importation of food and drugs. It is as follows: "The Secretary of the Treasury shall deliver to the Secretary of Agriculture, upon his request from time to time, samples of foods

¹ Regulation 39.

and drugs which are being imported into the United States or offered for import, giving notice thereof to the owner or consignee, who may appear before the Secretary of Agriculture, and have the right to introduce testimony, and if it appear from the examination of such samples that any article of food or drug offered to be imported into the United States is adulterated or misbranded within the meaning of this Act, or is otherwise dangerous to the health of the people of the United States, or is of a kind forbidden entry into, or forbidden to be sold or restricted in sale in the country in which it is made or from which it is exported, or is otherwise falsely labeled in any respect, the said article shall be refused admission, and the Secretary of the Treasury shall refuse delivery to the consignee and shall cause the destruction of any goods refused delivery which shall not be exported by the consignee within three months from the date of notice of such refusal under such regulations as the Secretary of the Treasury may prescribe: Provided, That the Secretary of the Treasury may deliver to the consignee such goods pending examination and decision in the matter on execution of a penal bond for the amount of the full invoice value of such goods, together with the duty thereon, and on refusal to return such goods for any cause to the custody of the Secretary of the Treasury, when demanded, for the purpose of excluding them from the country, or for any other purpose, said consignee shall forfeit the full amount of the bond. And provided further, That all charges for storage, cartage and labor on goods which are refused admission or delivery shall be paid by the owner or consignee, and in default of such payment shall constitute a lien against any future importation made by such owner or consignee." Regulations thirty-two to thirty-eight, inclusive, cover the provisions of this section. This statute does not in terms authorize the Secretary of the Treasury to open packages in order to take samples, but under the Act of March 2, 1901, the provisions of which have been repeated in subsequent agricultural appropriation Acts, he is authorized to open packages and take samples. The Secretary of the

Treasury is bound by the result of the examination of the samples delivered to the Secretary of Agriculture; and he must refuse to deliver the goods to the consignee if it appears from the samples that the food or drugs are adulterated or misbranded or is otherwise of a character prohibited by this section. No provision is made for appeal. Under the rulings of the Department of Agriculture imports of meat and meat food products of cattle, sheep, swine and goats are subject to the same restrictions as meats of domestic origin. Such meats and meat products must be accompanied by certificates showing their freedom from disease, or entry into the United States will be denied. This certificate must be issued by an official inspector of the country, district or city in which the meat is manufactured. It must be stated in it that the animals from which the meat or meat food products which are covered by the certificate are derived were inspected before and after slaughter and were found to be in a healthy condition;¹ that the animals furnishing the meat or meat products are cattle, sheep, swine or goats, as the case may be; and that the meat or meat food products covered by the certificate have not been mixed with the meat of any other animal. The official inspector who signs this certificate must have his authority viséed before the United States Consul for the district in which such inspector holds his office; but one authorization of this kind is sufficient for all shipments signed by the same inspector; and a new one is not necessary unless a new inspector signs the certificate. This certificate does not take the place of a port inspection concerning the condition of the shipment on arrival, whether it is fit for human food, whether it is infested with vermin, or whether it contains any substances forbidden by the regulations for the enforcement of the meat inspection law. This port inspection is made by the inspectors of the Bureau of Chemistry, and if the meat or meat food products be found not to conform to the law, the shipment is rejected, even if the certificate be in due form. Meat and meat food products of horses and dogs are not allowed entry into the United

¹ Regulation 32.

States. Stearin, for mixture with domestic oils, not animal, is admitted without a certificate, if the importer executes a penal bond conditioned upon the subsequent export of all stearin thus imported.² Imported meats and meat products which have not been mixed or compounded with or added to domestic meats may be transported by any common carrier from one State or Territory or the District of Columbia to any other State or Territory if the packages containing them be marked "Inspected under the Food and Drugs Act, June 30, 1906," if so marked when received for transportation. The interstate transportation of domestic meats and meat food products or of imported meats and meat food products which have been mixed or compounded with or added to domestic meats subjects both the shipper and the carrier to heavy penalties.³ If the sample on analysis or examination be found not to comply with the law, the importer is notified of the nature of the violation, the time and place at which final action will be taken upon the question of the exclusion of the shipment, and that he may be present, and submit evidence, which evidence, with a sample of the article, is forwarded to the Bureau of Chemistry at Washington, accompanied by the appropriate report card.⁴

§ 101. Interstate Transportation of Meat and Meat-Food Products.

"Regulation 64 of the Regulations Governing the Meat Inspection of the United States Department of Agriculture (Amendment No. 10 to B. A. I. Order No. 137) provides as follows:

Imported meats and meat-food products which have not been mixed or compounded with or added to domestic meats may be transported by any common carrier from one State or Territory or the District of Columbia to any other State or Territory if the packages containing them shall be marked "Inspected under the Food and Drugs Act, June 30, 1906," and are marked when received for transportation.'

² F. I. D. 74.

³ F. I. D. 73.

⁴ Regulation 36.

For a form of declaration for the shipper, see Regulation 33.

"It is held that packing cases, boxes, or other coverings containing imported meats or meat-food products in the original true containers which have not been mixed or compounded with or added to domestic meats may be marked with the legend 'Inspected under the Food and Drugs Act, June 30, 1906,' by the shipper. The interstate transportation under this legend of domestic meats and meat-food products or of imported meats and meat-food products which have been mixed or compounded with or added to domestic meats will subject both the shipper and the carrier to heavy penalties."¹

§ 102. Certificate for Imported Meats and Meat Food Products.

The following inquiry has been received regarding certificates for imported meats required by Regulation 32:

"We respectfully beg to submit a letter from Messrs. of, from whom we have been importing small quantities of canned meats, consisting principally of meat balls, preserved game in cans, etc.

"There being no inspector who could certify invoices for canned meats, we, of course can not import these goods any more. We would respectfully ask if a certificate as to purity, by the manufacturer, would not answer the purpose in this special case, there being no one in..... to officially certify.'

"The meat-inspection law of June 30, 1906, forbids the transportation in interstate or foreign commerce of the meat or meat-food products of cattle, sheep, swine and goats which are diseased, unsound, unhealthful, unwholesome, or otherwise unfit for human food. Meat or meat-food products of those animals, to which has been added any substance which lessens wholesomeness, or any drug, chemical or harmful dye or preservative, other than common salt, sugar, wood smoke, vinegar, pure spices and saltpeter, may not be transported in interstate or foreign commerce. The law further requires the ante-mortem and post-mortem inspection of the animals which furnish meat and meat-food products for inter-

¹ F. I. D. 73.

state or foreign commerce. All these requirements are based on the principle that uninspected meats of this character may be dangerous to health.

“The Food and Drugs Act of June 30, 1906, provides that a product which does not comply with the provisions of the Act ‘or is otherwise dangerous to health’ shall be denied the right of importation. It is held, therefore, that, except as hereinafter provided, imports of meat or meat-food products of cattle, sheep, swine and goats shall be subject to the same restrictions as meats of domestic origin. Such meats and meat-food products shall be accompanied by certificates showing their freedom from disease, or entry into the United States will be denied. For entry of meat or meat-food products of animals other than cattle, sheep, swine and goats, including fish, only the declaration required for foods other than meats is necessary.

“The certificate shall be that of an official inspector of the country, district or city in which the meat is manufactured. It shall be specified in the certificate that the animals from which the meat or meat-food products which are covered by the certificate are derived were inspected before and after slaughter, and were found to be in a healthy condition (see Regulation 32); that the animals furnishing the meat or meat-food products are cattle, sheep, swine or goats, as the case may be, and that the meat or meat-food products covered by the certificate have been mixed with the meat of no other animal.

“The official inspector who signs the certificate shall have his authority viséed before the United States consul. One authorization of this kind will be sufficient for all shipments signed by the same inspector, and it will not be necessary to furnish a new authorization unless a new inspector signs the certificate.

“The following are acceptable forms of certificates:

“1. I hereby certify that the shipment of [kind of meat] consigned byto.....and designated by [distinguishing marks] is the product of [kind of animals] which by ante-mortem and post-mortem veterinary inspection were shown to be free from disease and suitable for

food, and that the meat has not been treated with chemical preservatives or other foreign substance injurious to health.

"2. I hereby certify that the meat-product factory of the firm of..... is located in the meat-inspection district of the province of.....; that the animals killed in that establishment are subjected to competent official veterinary ante-mortem and post-mortem inspections; that all of the meat sold by that firm is the product of animals free from disease; and that all meat and meat food products of that firm are free from chemical preservatives or other foreign substances injurious to health."

"The certificate mentioned above will not take the place of port inspection as to the condition of the shipment on arrival, whether it is fit for human food, whether it is infected with vermin, or whether it contains any of the substances forbidden by the regulations for the enforcement of the meat-inspection law. This port inspection will be made by the inspectors of the Bureau of Chemistry, and if the meat or meat-food product be found not to conform to the law, the shipment will be rejected even if the certificate be in due form.

"Stearin, for mixture with domestic oils, not animal, may be admitted without certificate if the importer executes a penal bond conditioned upon the subsequent export of all stearin thus imported.

"Meat and meat-food products of horses and dogs will not be allowed entry into the United States."¹

§ 103. Imported Drugs and Medicines.

Imported drugs and medicines must bear the true name of the manufacturer and the place where they are prepared. Entry to all drugs and medicines which are so far adulterated as to render them inferior in strength and purity to the standard established by the United States and certain pharmacopoeias, is refused. This is by reason of certain sections of the Revised Statutes,¹ which are still in force.²

¹ F. I. D. 74.

² See Appendix.

¹ Sections 2933 to 2938 inclusive, are still in force.

§ 104. Minor Border Importations—Private Importations.

“Inquiry has frequently been made regarding the application of Regulation 33¹ (requiring a declaration to be attached to the invoice) to foods and drugs brought into the United States in small quantities by farmers living near the borders. One correspondent says: ‘Farmers along the borders are in the habit of occasionally bringing in, in their own teams, maple sugar in small quantities, also butter and like articles of food products of their own raising, and offering the same for entry at the different offices on the frontier. . . . The main question is as to whether or not the affidavits and other proof required by the pure food law shall be required in these instances of minor importations of this class of articles.’ Considering the nature of these importations, it is held that Regulation 33 does not apply to them, and that they may be imported without the declaration. Such products are subject to inspection, however, and if found to be in violation of the law will be excluded.”² “Recently certain shipments of foods and of drugs have been offered for entry into the United States, and an examination has disclosed the fact that they were adulterated or misbranded under the food and drugs Act. The shipments were refused entry into the United States, whereupon representations were made to the department that the materials were for consumption by importers or for free distribution among the friends or employees of the importers, and not for trading purposes, and the department was requested on this account to allow the entry of the misbranded or adulterated food or drug.

“The provisions of the Food and Drugs Act make no distinction between foods and drugs imported for consumption or free distribution by the importer and foods and drugs imported for trading purposes. The law provides that no misbranded or adulterated foods or drugs shall be admitted.

“Notice is given that these so-called private importations

¹ Concerning invoices of foods or drugs shipped to the United States to have attached to them a declara-

tion of the shippers, made before a United States consular officer.

² F. I. D. 60.

will be subjected to the same restrictions as ordinary imports."²

§ 105. Shipment Beyond Jurisdiction of the United States.

"The time allowed the importer for representations regarding the shipment may be extended at his request to permit him to secure such evidence as he desires, provided that this extension of time does not entail any expense to the Department of Agriculture. If at the expiration of this time, in view of the data secured in inspecting the sample and such evidence as may have been submitted by the manufacturers or importers, it appears that the shipment can not be legally imported into the United States, the Secretary of Agriculture shall request the Secretary of the Treasury to refuse to deliver the shipment in question to the consignee, and to require its reshipment beyond the jurisdiction of the United States."¹

§ 106. Imported Teas.

By the Act of March 2, 1897¹ provision is made for the inspection of imported teas. This Act prohibits the importation of any merchandise as tea which is inferior in purity, quality and fitness for consumption to standards established by a board appointed by the Secretary of the Treasury. Under the standards so established teas can not be colored, but there is no requirement in that Act that color must be mentioned in the label. The importation or sale in original packages of teas, whether colored or not, which are inferior to the standards established under this Act, is permitted. Colored teas, if repacked in the United States and put into interstate commerce, are subject to the provisions of the Food and Drugs Act of 1906 so far as regards the use of colors; but unless coloring matter is added by the person repacking teas within the United States, the matter will be made the subject

² F. I. D. 88.

¹ Regulation 38.

¹ 29 U. S. Stat. at Large 604;
U. S. Comp. St. 1901, p. 3194.

of inquiry by the Department of Agriculture. This statute of 1907 is constitutional. It is not an unconstitutional delegation of power to the Secretary of the Treasury to forbid the importation of teas inferior to the government standards of purity, quality and fitness for consumption, and which authorizes him to establish such standards upon the recommendation of a board of tea experts. The statute merely leaves to the Secretary the executive duty to effectuate the legislative policy as therein declared. No individual has such a vested right to trade with foreign nations as precludes Congress in the exercise of its plenary power from prohibiting, by this Tea Inspection Act or considerations of public policy, the importation of teas inferior to the government standards, on the theory that the importer is thereby deprived of his property without due process of law. And even though the statute be construed as not affording an opportunity for the importer to have a hearing, yet it is not invalid on the ground that he is denied a hearing without due process of law. Nor is due process of law denied by the Act when it commands the destruction of teas not exported within six months after their final rejection as not entitled to admission into the United States because inferior to the government standards.² The action of the board of appraisers in rejecting impure and unwholesome tea is a decision of fact by a tribunal to which the matter is referred by law, and its decision can not be reviewed by the courts on the theory that their action was illegal, because no standard as to the kind of tea was established by the board of experts appointed by the Secretary of the Treasury.³

§ 107. Declaration Concerning Imported Food and Drugs.

The form of the declaration to be signed by the shipper,

² *Buttfield v. Stranahan*, 192 U. S. 470, 24 Sup. Ct. 349, 48 L. Ed. 525; *Buttfield v. Bidwell*, 192 U. S. 498, 24 Sup. Ct. 356, 48 L. Ed. 536; *Buttfield v. United States*, 192 U. S. 499, 24 Sup. Ct. 356, 48 L. Ed. 537.
³ *San Lung v. Jackson*, 85 Fed. 502.

and which must be attached to the invoice of food or drug products, is prescribed by Regulation 33. Regulations 34 to 38 inclusive relate to the importation of food and drugs.

§ 108. Seizure in Transit.

Section ten of the Food and Drugs Act provides for the seizure of adulterated food or drugs when in transit from one State to another, or from a Territory to a State, or to the District of Columbia, or vice versa. If the statute were construed to prohibit a United States district attorney bringing an action unless the Secretary of Agriculture shall first certify to him that there has been a violation of the statute as shown by an analysis in the department of foods and drugs, it is difficult to see how this provision can be enforced. But such is not the construction placed upon it by the courts. The district attorney may file a libel against adulterated goods without having been directed to do so by the Secretary of Agriculture.¹

§ 109. Application of Regulations.

"These regulations shall not apply to domestic meat and meat-food products which are prepared, transported or sold in interstate or foreign commerce under the meat-inspection law and the regulations of the Secretary of Agriculture made thereunder."¹

§ 110. Alteration and Amendment of Regulations.

"These regulations may be altered or amended at any time, without previous notice, with the concurrence of the Secretary of the Treasury, the Secretary of Agriculture, and the Secretary of Commerce and Labor."¹

¹ United States v. Fifty Barrels 170 Fed. 449; affirmed 175 Fed. of Whisky, 165 Fed. 966; United 1022. Notice of Judgment 284.

States v. Knowlton Danderine Co., ¹ Regulation 39.

¹ Regulation 40.

§ 111. State Legislation Necessary.

Much of the food consumed never crosses the boundary of a State or Territory, and therefore is in no way affected by the Food and Drugs Act of 1906. In fact, the great bulk of the food consumed is produced in the State of its consumption. It is not so much so with drugs, but still it is true with reference to quite a large percentage of them. In order, therefore, to fully protect the public from impure and adulterated food and drugs, State legislation must supplement the Federal legislation. Happily, that in a great measure has been done. The Food and Drugs Act of 1906 has given a great impetus to State legislation, it serving as a model in a number of instances; and in a number of instances the Federal regulations have likewise served as a model. Uniformity in the laws on this subject, as well as in the regulations, is greatly to be desired, thereby preventing confusion and rendering trade and commerce more easy.

CHAPTER III.

TO WHAT ARTICLES STATUTE APPLIES.

SEC.

112. Foods.

SEC.

113. Drugs.

§ 112. Foods.

Section six declares that "The term 'food', as used herein [in the Act] shall include all articles used for food, drink, confectionery or condiment by man or other animals, whether simple, mixed or compounded." This is broad enough to cover hay, grain or other food for animals; but food for poultry is not included, for the very obvious reason that "poultry" is not covered by the word "animals." It includes meats and meat products of all kinds. But it may well be doubted if it covers horse meat, for horse meat has never been recognized as an article of food in this country; and it would be a stretch of the imagination to hold it covers dog meat. It, however, covers the meat of cattle, sheep, goats, swine, deer, elk, antelope, buffalo, bear and squirrels. It also covers poultry meat, of whatever kind, including the meat of wild turkeys, quail or partridges, wild chickens, and all feathered wild game. Likewise it covers fish and all sea-food, such as oysters and clams. The regulations, however, provided that they "shall not apply to domestic meat and meat-food products which are prepared, transported or sold in interstate or foreign commerce under the meat-inspection law and the regulations of the Secretary of Agriculture made thereunder."¹ The statute covers salt, sugar and spices; but, if used as medicine or in connection with medicine, then they must comply with the requirements for drugs. Coffee and tea are foods, so are liquors, wines, beers and all beverages. So it includes mineral water and all drinking waters. Of course,

¹ Regulation 39.

PURE FOOD—13.

it includes milk. Flavoring extracts are foods, unless used as medicines, when compliance must be made with the drug regulations. Of course, confectionery is included, and chewing gum, perhaps, comes under this classification, though under the English statute, which defines food to "include every article used for food or drink by man, and any article which ordinarily enters into or is used in the composition or preparation of human food," as well as "flavoring matters and condiments,"² chewing gum is not included, not being an "article used for food" within the meaning of that Act.³ An earlier Act defined food to "include every article used for food or drink by man, other than drugs or water,"⁴ and this was held not to cover baking powder made up of twenty percent of bicarbonate of soda, forty percent of alum, and forty percent of ground rice.⁵

§ 113. Drugs.

The statute provides "That the term 'drug,' as used in this Act, shall include all medicines and preparations recognized in the United States Pharmacopoeia or National Formulary for internal or external use, and any substance or mixture of substances intended to be used for the cure, mitigation or prevention of disease of either men or other animals."⁶ This, of course, includes all "patent" or proprietary medicines, whether for man or animals. It includes all pharmaceutical preparations, as generally understood, plasters, corn cures, salves, ointments, liniments, medicinal soaps, hair tonics, cold cream or massage cream, talc powder, perfumes, toilet preparations, tooth powders, liquid dentrifices and stock foods of all kinds. It does not include disinfectants, and possibly not bay rum, face powder or smelling salts. The line between a drug and a food is often very thin. Thus sugar, salt and spices, if used as medicine or in connection

² 62 and 63 Vict., ch. 51, § 26.

⁴ 38 and 39 Vict., ch. 63, § 2.

³ *Shortt v. Smith*, 11 T. L. R. 325; *Bennett v. Tyler*, 64 J. P. 119, 81 L. T. 787, 19 Cox C. C. 434.

⁵ *James v. Jones*, 58 J. P. 230; *Warren v. Phillips*, 44 J. P. 61.

⁶ Section 6.

with medicine, are drugs; but if used as a food, or in connection with food, then it is a food and not a drug. So turpentine or castor oil, if used as a medicine, is subject to the requirements of the statute, but if the former be used in connection with paint, or the latter used for leather dressing, it will not be subject to the provisions of this statute. The English statute provides that "the term 'drug' shall include medicine for internal and external use."² Under this statute it was held that beeswax adulterated with fifty percent of paraffin was not a drug, although it is used in the preparation of medicines, and is included in the British Pharmacopoeia. In this case the sale was by a grocer, but one of the judges thought if the sale had been by a chemist—the English term for a druggist—the result would have been different. The test seems to be in that country whether the article be sold for medicinal use or for food.³ Arsenical soap containing no arsenic has been held not to be a drug.⁴

² 38 and 39 Vict., ch. 63, § 2.

³ *Fowle v. Fowle*, 60 J. P. 758,
75 L. T. 514, 18 Cox C. C. 462.

⁴ *Houghton v. Taplin*, 13 T. L.
R. 386.

Under the English statute an author of repute has suggested that sulphur, carbolic acid and sulphur acid are not drugs. *Bell's Sale of Food and Drugs Act*, p. 4.

CHAPTER IV.

ADULTERATION OF FOODS—UNFIT FOODS.**ART. I. GENERAL PROVISIONS.****ART. II. SPECIFIC ARTICLES OF FOOD.****ART. I.—GENERAL PROVISIONS.**

SEC.	SEC.
114. Adulteration defined.	122. Food standards.
115. Putrid—Decomposed.	123. Confectionery—Liquors — Narcotic drugs.
116. Products not specifically named in Act.	124. Confectionery, use of shellac and other gums.
117. Character of raw materials.	125. Food containing filthy, decomposed or putrid matter—Animals unfit for food—Statute.
118. Colors and preservatives.	126. "Filthy," "decomposed" and "putrid" defined.
119. Coloring, powdering, coating and staining.	
120. Abstraction of valuable constituents.	
121. Admixture of inferior ingredients.	

§ 114. Adulteration Defined.

The lexicographical definition of "adulteration" is "the act of adulterating, or corrupting by the admixture of foreign and base elements, especially for fraudulent purposes; debasement; as, the adulteration of tea or coffee."¹ The Food and Drugs Act of 1906, however, assigns a broader meaning to this term. Thus section seven declares "That, for the purposes of this Act, an article shall be deemed to be adulterated . . . in case of food:

First. If any substance has been mixed and packed with it so as to reduce or lower or injuriously affect its quality and strength.

Second. If any substance has been substituted wholly or in part for the article.

¹ Standard Dictionary, "Adulteration."

Third. If any valuable constituent of the article has been wholly or in part abstracted.

Fourth. If it be mixed, colored, powdered, coated or stained in any manner whereby damage or inferiority are concealed.

Fifth. If it contain any added poisonous or other added deleterious ingredient which may render such article injurious to health: Provided, that when in the preparation of food products for shipment they are preserved by any external application applied in such manner that the preservative is necessarily removed mechanically, or by maceration in water, or otherwise, and directions for the removal of said preservative shall be printed in the covering or the package, the provisions of this Act shall be construed as applying only when said products are ready for consumption.

Sixth. If it consists in whole or in part of a filthy, decomposed or putrid animal or vegetable substance, or any portion of an animal unfit for food, whether manufactured or not, or if it is the product of a diseased animal or one that has died otherwise than by slaughter.”²

§ 115. Putrid—Decomposed.

“What is charged in this information, and what is therefore on trial before you, is composed of two parts; that is,

² “Now the word ‘adulterated’ is of course one of very wide, or rather uncertain meaning, and therefore for the purpose of this Act it is defined with great particularity as meaning in the case of food, two things which are relevant to this trial: An article of food is adulterated if it contains any added poisonous or other added deleterious ingredient which may render such article injurious to health. It is also for the purpose of this Act deemed adulterated (although the word can not be used in that sense ordinarily), if it con-

sists in whole or in any part of a filthy, decomposed or putrid animal or vegetable substance.

“The Act then continues, although the rest of this section does not, I think, relate to this case, but it shows the general scope of the Act, ‘or if it consists of any portion of an animal unfit for food, whether manufactured or not, or if it is the product of a diseased animal, or one that had died otherwise than by slaughter.’ I have read that merely to show the general scope of the legislation in this regard.” N. J. 825.

the charge is of two parts. The first is that these eggs which are the subject of investigation contained formaldehyde, and it is said that formaldehyde is a deleterious ingredient which may render an article injurious to health; and it is also charged, irrespective of the formaldehyde, that the eggs themselves were filthy, decomposed or putrid. Now, probably there is nothing so difficult in the world as a definition; sometime when you have an opportunity, try to make an accurate, full, complete definition of anything—say a coat—and you will find it very hard; but from dictionaries, and from the questions put to witnesses, and the study I have given the matter, I charge you that the meaning of the word ‘putrid’ is, that a putrid substance is in such a state of decay as to be fetid or stinking from rottenness; an article which is decomposed is an organic body (as are eggs), reduced or being reduced to a state of dissolution by the processes of a natural decay, and an article which is filthy or dirty, noisome or nasty. Take up the last word first; after some consideration I have concluded, and so instruct you, that inasmuch as it is a matter of common knowledge that an egg is not of itself dirty, such an article, namely, an egg, may become putrid or decomposed by the simple process of decay and the resultant or natural causes, but it will not become filthy, unless something be added thereto which renders it dirty, noisome or nasty.”¹

§ 116. Products not Specifically Named in Act.

In an instance of a product not specifically named in the Pure Food and Drugs Act, they must be such as to either deceive the public or be detrimental to health; and the government must show that the product in question was either deceptive or injurious before it can insist upon a conviction. In an instance, of course, where the product is specifically denounced by the statute, it is not necessary to show either that it is deceptive or injurious to health.¹

¹ N. J. 825. See Section 126.

ed States v. Buffalo Cold Storage

¹ French Silver Dragee Co. v.

Co., 179 Fed. 865.

United States, 179 Fed. 824; Unit-

§ 117. Character of Raw Materials.

If food "consists in whole or in part of a filthy, decomposed or putrid animal or vegetable substance, or any portion of an animal unfit for food, whether manufactured or not, or if it is the product of a diseased animal, or one that has died otherwise than by slaughter," then it is deemed to be adulterated.¹ The regulations provide that "The Secretary of Agriculture, when he deems it necessary, shall examine the raw materials used in the manufacture of food and drug products, and determine whether any filthy, decomposed or putrid substance is used in their preparation," and that he "shall make such inspections as often as he may deem necessary."² Of course, this section of the statute and this regulation cover milk which is unfit for use as food because of filth, or which is the product of diseased cows. If mineral or other drinking water is unfit for use because of the presence of filth or decomposed animal or vegetable substance, it is denounced by this statute. So it covers any filthy, decomposed or putrid vegetable substance intended or prepared as food which is unfit for use as food because of such condition.

§ 118. Colors and Preservatives.

Under section seven of the Act an article of food is deemed to be adulterated "if it contains any added poisonous or other added deleterious ingredient which may render" it "injurious to health." An exception is made in the statute "that when, in the preparation of food products for shipment, they are preserved by any external application applied in such manner that the preservative is necessarily removed mechanically or by maceration in water, or otherwise, and directions for the removal of said preservative shall be printed on the package," the provisions of the Act "shall be construed as applying only when said products are ready for

¹ Section 7 of Food and Drugs Act of 1906. visions of these regulations—at least state courts can not. St.

² Regulation 16. Courts cannot take judicial notice of the pro- Louis v. Kruempeler (Mo.), 139 S. W. 446.

consumption.”¹ It will be observed that this clause applies only to poisonous or other added deleterious ingredients which may render the article of food injurious to health. If the material, though poisonous, is naturally present in the food, it does not render it adulterated. This distinction must be borne carefully in mind, for otherwise many fruits, such as peaches or cranberries, would be excluded from the markets by reason of the acids they contain, which would be poisonous or deleterious if used in concentrated form, though not poisonous if consumed merely on eating the fruit in its normal condition. But colors or preservatives that are harmless may be used if they do not conceal the damage to or inferiority of the food. If the coloring or preservative is poisonous, then it does not matter how small is the amount used, even though its poisonous effect upon the person consuming it may not be noticeable or, in fact, not produce any result. The Act does not undertake to prescribe what colors and preservatives are and what are not poisonous. Under section three, giving the Secretary of the Treasury, the Secretary of Agriculture and the Secretary of Commerce and Labor power to make rules and regulations for carrying the Act into force, such secretaries have delegated to the Secretary of Agriculture the power and duty to “determine from chemical or other examinations . . . the names of those substances which are permitted or inhibited in food products.”² He is also empowered to determine “the principles which shall guide the use of colors, preservatives, and other substances added to foods.”³ When these findings are approved by the other two Secretaries they become a part of the regulations. But these findings, though duly approved, are not binding upon the courts, although they carry great weight. It should also be observed that no manufacturer will be prosecuted if he uses only those colors and preservatives the findings concerning which have been approved by the two Secretaries, for the Secretary of Agriculture in no instance would certify

¹ Section 7.

³ Regulation 15.

² Regulation 15.

to a district attorney that there had been a violation of the Act when only one of such colors or preservatives had been used, and without such certification there would be no prosecution, unless it be to libel and destroy the food colored or in which the preservative has been used. The regulations adopted under this Act of 1906 do "not apply to domestic meat and meat-food products which are prepared, transported or sold in interstate or foreign commerce under the meat-inspection law and regulations of the Secretary of Agriculture made thereunder,"⁴ but under Regulation 39 of the Regulations Governing the Meat Inspection of the United States Department of Agriculture certain preservatives can be used in meat or meat products. They are "common salt, sugar, wood smoke, vinegar, pure spices and saltpeter. No colors may be used in meats or meat products except such as may be approved by the Secretary of Agriculture."

§ 119. Coloring, Powdering, Coating and Staining.

Clause four of section seven provides that food shall be deemed adulterated "If it be mixed, colored, powdered, coated or stained in a manner whereby damage or inferiority is concealed." The regulations provide that:

- (a) "Only harmless colors may be used in food products.
- (b) "The reduction of a substance to a powder to conceal inferiority of character is prohibited.
- (c) "The term 'powder' means the application of any powdered substance to the exterior portion of articles of food or the reduction of a substance to a powder.
- (d) "The term 'coated' means the application of any substance to the exterior portion of a food product.
- (e) "The term 'stain' includes any change produced by the addition of any substance to the exterior portion of foods which in any way alters their natural tint."¹

The word "mixed" refers to the mixing of different substances to form the mixtures, blends and compounds referred to in section eight. It is very clear that the mixture of a

⁴ Regulation 39.

¹ Regulation 12.

substance which has been damaged or is inferior in such proportions, and in such manner with other substances so as to conceal its damaged condition or inferiority, is forbidden by the statute. Even harmless coloring matter is forbidden if its effect is to conceal a damaged condition or inferiority. If the coloring matter is harmless, and it does not conceal a damaged condition or inferiority, then its use is not forbidden. But this statute does not prohibit the coloring of butter, which is permitted by the Act of August 2, 1886,² nor the coloring of cheese, which is also permitted by the Act of June 6, 1896.³ The reduction of a substance to a powder in order to conceal its inferiority in character is forbidden. So an article of food to the exterior of which any powdered substance is applied with the effect of concealing damage or its inferiority in character or quality, is deemed an adulteration. To apply a coating of any substance to the exterior portion of any food product is an adulteration, and, according to the terms of the statute, it is not necessary that the coating conceal its damaged character or inferiority, though probably the courts will be inclined to hold that it must have that effect. To stain the exterior portion of food in any way which alters its natural tint is also an adulteration under this Act. The intent with which these several violations of the statute is done is immaterial. There may be no intention to violate the statute, yet if the act produces the result forbidden by the statute an offense has been committed.

§ 120. Abstraction of Valuable Constituent.

The statute provides that an article of food shall be deemed adulterated "if any valuable constituent of the article has been wholly or in part abstracted" from it.¹ But an article from which a valuable part of it has been abstracted may be sold if the package is so labeled or accompanied by a statement to show that fact, if it be wholesome. Thus regulation

² 24 U. S. Stat. at Large 209,
§ 1. See Appendix.

³ 29 U. S. Stat. at Large 253,
§ 1. See Appendix.

¹ Section 7.

twenty-six provides that, "When an article is made up of refuse materials, fragments or trimmings, the use of the name of the substance from which they are derived, unless accompanied by a statement to that effect, shall be deemed a misbranding. Packages of such materials may be labeled 'pieces,' 'stems,' 'trimmings,' or with some similar appellation." This does not prevent the sale of skimmed milk if it be sold as skimmed milk and not as whole milk.

§ 121. Admixture of Inferior Ingredients—Compound—Distinctive Name.

Under section seven it is provided that "an article shall be deemed adulterated . . . in the case of food, if any substance has been mixed and packed with it so as to reduce or lower or injuriously affect its quality or strength," or "if any substance has been substituted wholly or in part for the article." This is the common form of adulteration. Under the first clause, if the substance "mixed and packed with it does not reduce or lower or injuriously affect its quality or strength," there is no adulteration. Under the second any substitution, "wholly or in part for the article," is an adulteration. The adulteration may be carried so far as to completely substitute one substance for another that is the pure article. This would be covered by the first clause. But if not carried to that extent—to the extent of complete substitution—then both clauses cover it. The second clause covers such substitution whether or not the quality or strength be reduced or lowered or injuriously affected. It matters not that the product resulting from the admixture of another substance is better or more wholesome than the pure article. Such a claim is no defense. The purchaser has a right to the very substance which he calls for when making the purchase, and it does not lie in the vendor's mouth to say that, although one substance had been substituted in whole or part for another, the substituted article is better than the substance it displaces.¹ The question of "misbranding" is intimately

¹ But suppose the purchaser and a higher or better grade of calls for a certain grade of sugar, sugar has been substituted in part

connected with the question involved in this paragraph. If adulterated food is sold unbranded, or without a label showing its adulteration, an offense is committed. If the label truly state the several substances entering into the food, then such food may be sold and no offense committed.² It is mixed or blended or compound food. Regulation eleven provides that "No substance may be mixed or packed with a food product which shall reduce or lower its quality or strength. Not excluded under this provision are substances properly used in the preparation of food products for clarification or refining, and eliminated in the process of manufacture."³ Taking into consideration section eight, on the subject of misbranding, it appears that an admixture with or substitution in an article of food of any mineral substance, or any inert substance, is prohibited. The admixture of any other substance is permitted if the resulting product is plainly stated on the label to be a mixture, compound or blend, and the name of the added substance is also stated. So proprietary foods are exempt from the charge of adulteration if "known as articles of food, under their own distinctive names, and not an imitation of or offered for sale under the distinctive name of another article."⁴ Of course, the name of such a food must "be accompanied, on the same label or brand, with a statement of the place where" it had been manufactured or produced. So adulterated imitation food may be sold if it "is plainly stated on the package in which it is offered for sale" that it is an imitation. Under regulation eleven, above quoted, the only food that can be made the basis for proceedings under the Food and Drugs Act because of adulteration is the finished product which contains an adulterant or other prohibited substance. The addition of

for that removed. Has an offense been committed? Clearly no; for the purchase was of sugar, and the purchaser received pure sugar. But if a lower grade was substituted for a higher "so as to reduce or lower . . . its quality or strength" then there would be an adultera-

tion. But a request for "milk" means pure milk and not adulterated milk. *Kench v. O'Sullivan*, 10 N. S. W. L. R. 605, 27 W. N. (N. S. W.) 137.

² Section 8 of Act of 1906.

³ Regulation 11.

⁴ Section 8 of Act of 1906.

water or other proper diluent is not prohibited whenever it is necessary to reduce an article above standard strength to that of standard strength. An instance of this kind would be that of putting water in whisky which is above the standard strength. That is expressly permitted by the Act of March 3, 1897.⁵ The effect of blending articles of food has been carefully considered by Justice Jones, of the District Court for the Middle District of Alabama, and the Department of Agriculture has accepted his interpretation as correct. "The manufacturer," says he, "without violating any of the provisions of the statute against adulteration, may mix any number of constituents in his compound, so long as these constituents are not poisonous or deleterious to health, and he gives the compound a distinctive name and states where it is manufactured. The matter thus produced is 'the article of food' whose quality and strength the statute seeks to preserve, and the nature of the product in these respects is fixed and determined by the elements which enter into it. How is it possible, chemically, or in the eye of the law, to 'lower or injuriously affect' the quality or strength of the particular 'article of food' whose characteristics are thus produced, and safeguarded by the law as thus produced, under its own distinctive name, by mixing in the compound anything which may be lawfully incorporated therein? Putting in a mixture of things which may be lawfully blended therein can not amount to adulteration of the blend, since, other things aside, the statute declares, the other conditions being complied with, the blend shall not thereby 'be deemed to be adulterated'."⁶

⁵ 29 U. S. Stat. at Large 627, § 2.

⁶ N. J. 990. "Other observation seems pertinent. Under the statute compounds known as articles of food can be sold under their own distinctive names, so long as no deleterious matter is put in the product and the label states where the product

is manufactured and it is not an imitation sold under the distinctive name of another article. The manufacturer here would have fully obeyed the statute if he had put nothing on his product but the name 'Corno Horse and Mule Feed,' complying with its requirements in other respects." N. J. 990.

§ 122. Food Standards.

Under the Agricultural Appropriation Act of March 3, 1903,¹ provision is made for the investigation of the adulteration of foods, condiments, beverages and drugs, and also "to enable the Secretary of Agriculture in collaboration with the Association of Official Agricultural Chemists, and such other experts as he may deem necessary, to establish standards for food products and to determine what are regarded as adulterations therein." In accordance with the provisions of this Act the Department of Agriculture has published a circular, found in the appendix, of standards of purity for a large number of food products.² The standard of food thus adopted under the Act of 1903 has become the standard of food under Food and Drugs Act of 1906. In a case it was charged that terpeneless lemon extract was adulterated and was also misbranded, because the substance offered for sale and misbranded as terpeneless lemon extract was not such as complied with the standard established by the Secretary of Agriculture in collaboration with the Association of Official Agricultural Chemists under the Act of 1903; and this was held to be a good charge. After quoting several of the provisions of the Act of 1906 concerning adulteration and misbranding, the court said:

"The defendants believing, as admitted in open court, that only a nominal fine would be imposed upon a plea of guilty as for a technical violation of the Pure Food Law, pleaded guilty.

"The defendants having, within some six or seven months prior to the filing of this information, pleaded guilty to two so-called technical violations of the Pure Food Law, and being thereupon fined only in nominal amounts, the court on

¹ 32 U. S. Stat. at Large 1158.

² This is Circular 19. The courts can not take judicial notice of this circular. N. J. 301. *St. Louis v. Kruempeler*, (Mo.), 139 S. W. 446.

"That the Secretary of Agricul-

ture had the constitutional power under the Act of 1903 to establish standards for purity of food products is not disputed, nor could it be under the decision of the Supreme Court of the United States." N. J. 823.

this plea imposed a fine of \$200. Thereupon the defendants, deeming themselves aggrieved, and upon the urgent solicitation of their counsel, the court permitted counsel to file a brief in support of the proposition that no offense in fact had been committed under the laws of the United States. Counsel for the defendants submitted an elaborate brief, to which the district attorney filed a brief in answer.

"Upon consideration of these, the court is of opinion that there is an offense against the laws of the United States charged in this information, and sees no reason why, under the circumstances of the case, the fine imposed was too large.

"On March 3, 1903, the Congress appropriated a sum of money to the Department of Agriculture for the fiscal year ending June 30, 1904, for the purpose, among others, 'to enable the Secretary of Agriculture, in collaboration with the Association of Official Agricultural Chemists, and such other experts as he may deem necessary, to establish standards of purity for food products and to determine what are regarded as adulterations therein, for the guidance of the officials of the various States and of the courts of justice. . . .'

"The information alleges that the standard of purity for terpeneless lemon extract was established by the Secretary of Agriculture, and it appears aliunde that in the publication of Department of Agriculture, Circular No. 19, the following: 'Terpeneless extract of lemon is the flavoring extract prepared by shaking the oil of lemon with dilute alcohol, or by dissolving terpeneless oil of lemon in dilute alcohol, and contains not less than two-tenths (0.2) percent by weight of citral derived from oil of lemon.'

"That the Secretary of Agriculture had the constitutional power under the Act of 1903 to establish standards for purity of food products is not disputed, nor could it be under the decisions of the Supreme Court of the United States. He adopted the standard for the article of food in question as alleged in the information. The allegation in the information is that the standard so established was existent at the time of the filing of the information.

"On June 30, 1906,³ the Congress provided: 'That the introduction into any State . . . from any other State . . . any article of food . . . which is adulterated or misbranded' (within the meaning of this Act), 'is hereby prohibited.' And the offender 'shall be guilty of a misdemeanor, and for such offense be fined not exceeding two hundred dollars for the first offense, and upon conviction for each subsequent offense not exceeding three hundred dollars, or be imprisoned not exceeding one year, or both, in the discretion of the court.'

"The claim of the defendants is that the statute does not distinctly incorporate the standards fixed by the Secretary of Agriculture within the provisions of the Food Law, and it does not therefore define a criminal offense.

"The answer to this is that if the Secretary of Agriculture had the power to fix standards, and did fix a standard of this food product, which standard was in existence at the time the Food Law was passed, and the information charges wherein the article was adulterated and misbranded with respect to this standard, there seems to be no room for doubt that if, upon proof that the article did not conform to the requirements of the standard of purity established by the Secretary of Agriculture, then an offense had been charged under the laws of the United States.

"The defendants claim that the Act of 1903 was a mere appropriation law, but it would seem that a law appropriating a certain sum of money to the Secretary of Agriculture for the purpose of doing certain things which he could constitutionally do for the purpose of fixing standards of purity of food, and that he did so fix them, carries with it a necessary implication that he could do that for which the money was appropriated to him for the purpose of doing, and when he fixed the standards, then those standards prevailed, unless they have been changed since. It does not appear that they have been changed.

"The defendants claim that as the Act of 1906 does not in-

³ 34 Stat. at Large 768.

corporate the standards fixed by the Secretary of Agriculture, the act of the Secretary was legislative in character, and hence no criminal offense could be predicated upon it. It is also claimed that since the Act of 1906, in describing drugs, refers to the Pharmacopoeia or National Formulary, and in describing what food is refers to no standard at all, Congress has not fixed any standard for food. Both of these claims are based on a misapprehension. Section 6 of the Act of 1906 provides:

“That the term “drug,” as used in this Act, shall include all medicines and preparations recognized in the United States Pharmacopoeia or National Formulary for internal or external use, and any substance or mixture of substances intended to be used for the cure, mitigation or prevention of diseases of either man or other animals. The term “food,” as used herein, shall include all articles used for food, drink, confectionery or condiment by man or other animals, whether simple, mixed or compound.’

“These are mere terms of description. If the Pharmacopoeia or National Formulary says something is a drug, it is a drug under the meaning of the Act. Or if it comes under the other description of what a drug is, it is a drug, and so food also is described. There are no standards fixed in either case, for if any substance or mixture is intended to be used for the cure, mitigation or prevention of disease of either man or other animals, it is nevertheless a drug, whether it is recognized in the Pharmacopoeia or National Formulary or not. The standard for food was fixed by the Department of Agriculture under the Act of 1903. If one in the business of making food products would look for the standard he would find it in the promulgations of the Secretary of Agriculture made under direct authority of Congress. The Act of 1903 does not describe any offense, but the Act of 1906 says that if any article of food adulterated or misbranded is manufactured or transported so as to become the subject of interstate commerce, the maker, transporter, etc., shall be guilty of an offense. How shall it be known whether he is guilty of an offense or not? The answer is clear, by referring to the stand-

ards which have been established under the authority of Congress.

"The Secretary of Agriculture, under authority of Congress, fixed the standards of purity for certain foods. This is a fact upon which the law of 1906 operates. It is not a law. The law of 1906, under which the offense is charged to have been committed, says what food is. The offense charged is that the defendant transported a food, and that it was adulterated and misbranded. How is this to be ascertained? By looking to the standard as a fact. •

"The question is dealt with in *Coopersville Co-operative Creamery Co. v. Lemon*.⁴ It appears that the *Oleomargarine Act*, May 19, 1902, U. S. Comp. Stat. Sup., 1907, page 637, provides: That 'any butter in the manufacture or manipulation of which any process or material is used with intent or effect of causing the absorption of abnormal quantities of water, milk or cream,' shall be deemed 'adulterated butter,' and authorizes the Commissioner of Internal Revenue to decide what substances are taxable thereunder. It also authorizes him, with the approval of the Secretary of the Treasury, to make all needful regulations for carrying the Act into effect. It was held that such a regulation, providing that butter containing sixteen percent or more of water, milk or cream, should be classified as 'adulterated butter' under the Act, was within the authority so granted, and was valid, being neither an exercise of legislative or judicial power, but merely a determination as a question of fact of what constitutes an 'abnormal' quantity of water, etc., upon which the application of the statute is made to depend.

"Judge Lurton, speaking for the Circuit Court of Appeals, says: 'The contention that the delegation of authority to promulgate such a regulation is to delegate either legislative or judicial power to an executive officer is founded upon a misapprehension of the character of the authority delegated. That Congress can not delegate legislative authority or power to any executive official or board of officials is elementary.

⁴ 163 Fed. 145.

To do so would be destructive to our whole system and scheme of government.⁵ That the delegation of authority to add to or take from a law would be to delegate legislative power must also be conceded. But that Congress may enact a law and delegate the power of finding some fact or state of things upon which the operation of the law is made to depend is equally clear.⁶ The authority to make all needful regulations not inconsistent with law is not a delegation of power to add something to an incomplete law nor a grant of judicial power. It is only an authority to determine the fact upon which the operation of the law is made to depend. Congress might have made the necessary tests, and might have acquired the knowledge of the butter-making art to enable it to have enacted that adulterated butter should consist of butter having a moisture content of sixteen percent or more. But that would have been an unnecessary detail, for it was altogether competent to declare that butter which contained an abnormal quantity of water, milk or cream, should be classified as adulterated butter, and that the fact as to that was, in dairy butter, an abnormal proportion of water, milk or cream, should be determined by a regulation of the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury.'

"It surely can make no difference that the authority to establish the standard was not in the Act itself creating the offense as in the Oleomargarine Law. It may be well said that the Food and Drugs Act of 1906 was made with special reference to the standards of food fixed by the Secretary of Agriculture under prior authority of Congress.

"It is true that the unreported case of the *United States v. St. Louis Coffee and Spice Mills*, decided May 22, 1909, in the District Court for the Eastern District of Missouri, bears out the contention of the defendant, but in a subsequent case,

⁵ Citing *Field v. Clark*, 143 U. S. 649, 12 Sup. Ct. 495, 36 L. Ed. 294.

⁶ Citing *Field v. Clark*, 143 U. S. 649, 12 Sup. Ct. 495, 36 L. Ed. 294; In re *Kollock*, 165 U. S. 526,

17 Sup. Ct. 444, 41 L. Ed. 525, and *Union Bridge Co. v. United States*, 204 U. S. 364, 27 Sup. Ct. 367, 51 L. Ed. 523.

United States v. Edward Weston Tea and Spice Company, decided November 30, 1909, the same court submitted to the jury a case necessarily involving the same question. If he at that time entertained the opinion expressed in the other case, he would not have permitted the case to go to the jury.

"The court is of opinion that the information charges an offense. There is some doubt in the court's mind as to the propriety of passing upon this question of law at all. The defendant, before pleading guilty, had the opportunity to demur to the information, and, having many months in which to make up his mind what to do, pleaded guilty. Not until the imposition of a fine unexpectedly large did he raise the question here discussed. It is probable that, the fine having been imposed on the plea of guilty, the matter has passed from the power of the court to the pardoning power. The court has no intention of making this case a precedent which may be followed in similar cases. If persons charged with an offense against the laws of the United States, with ample time to prepare their defense, assisted by able counsel, nevertheless pleaded guilty, and a fine was imposed, it is difficult to see upon what ground they have right to appeal to the court by an attack upon the legality of the proceeding.

"The court has only looked into the subject lest some injury has come to the defendants through their own plea of guilty.

"The Food and Drugs Act is one of the most beneficent legislative enactments of recent times, and its provisions must be observed."

§ 123. Confectionery—Liquors—Narcotic Drugs.

Section seven of the Food and Drugs Act of 1906 provides: "That for the purposes of this Act an article shall be deemed to be adulterated . . . in the case of confectionery if it contain terra alba, barytes, talc, chrome yellow or other mineral substance or poisonous color or flavor, or other ingredient deleterious or detrimental to health, or any vinous, malt or spirituous liquor or compound or narcotic drug."¹

¹ United States v. Clark; N. J. 823. ¹ Section 7.

The regulation based upon this provision of the statute is as follows:

“(a) Mineral substances of all kinds (except as otherwise provided in regulation fifteen),² are specifically forbidden in confectionery whether they be poisonous or not.

“(b) Only harmless colors or flavors shall be added to confectionery.

“(c) The term ‘narcotic drugs’ includes all the drugs mentioned in section eight, Food and Drugs Act, June 30, 1906, relating to foods, their derivatives and preparations, and all other drugs of a narcotic nature.”³ In the Official Bulletin on Food Standards candy is defined as “a product made from a saccharine substance or substances with or without the addition of harmless coloring, flavoring or filling materials, and contains no terra alba, barytes, talc, chrome yellow, or other mineral substances, or poisonous colors or flavors, or other ingredients detrimental to health, or any vinous, malt or spirituous liquor or compound, or narcotic drug.”⁴ No definition is embraced in the statute. Possibly ice cream comes within this clause of the statute, though it would seem that it is nearer a food than confectionery; but it is clear that chewing gum belongs to this classification of products. Any mineral substance placed in candy is an adulteration of it, and the same is true of paraffin and all mineral colors. Vegetable colors and flavors, if harmless, may be used in confectionery, but saccharine may not be used. Gelatin, if it does not contain bisulphates or other deleterious substances, may not be used in it; nor can glucose, if it contains like substances. Bleachers or hardeners containing bisulphates can not be used. For the purpose of glossing candy, shellac may be used if the alcohol in which it be dissolved is so completely evaporated as to leave no trace on or in the candy. Harmless fats and oils and vaseline may be used for finishing candy. Paraffin or chicle may be used in chewing gum if the soluble ingredients, sugar, color and flavor, conform to the

² This Regulation relates to color and preservatives.

⁴ Official Bulletin No. 19. In Appendix.

³ Regulation 10.

requirements of the statute. Neither vinous, malt nor spirituous liquors or compounds can be used in candy. But this does not exclude the use of flavoring extracts, nor the use of vinous, malt or spirituous liquors or compounds for flavoring merely, if there be no trace of alcohol in the finished product. A drug of a narcotic nature can not be used in confectionery. Not only all the drugs mentioned in section eight of the Food and Drugs Act are prohibited, but also their derivatives, as stated in Regulation 28, as well as all other drugs of a narcotic nature. When the charge was that confectionery was adulterated with "Silver Dragee"—an article not specifically named in the statute—it was held that the government must show that it was either calculated to deceive the public or was poisonous, and in passing on the case the court said:

"In interpreting the provisions of the Act now in question—the Pure Food Act—it is of importance to ascertain at the outset the objects which Congress sought to accomplish by its enactment and the evils intended to be remedied by it. If we go outside the Act itself and consider the circumstances surrounding its adoption, we find a Congressional committee report urging that the objects of the bill were:

"(1) To protect the purchaser of food products from being deceived and cheated by having inferior and different articles passed off upon him in place of those which he desired to obtain;

"To protect such purchaser from injury by prohibiting the addition of foods of foreign substances poisonous or deleterious to health."

"Or, briefly stated, 'that which is forbidden is the sale of goods under false pretenses, or the sale of poisonous articles for food.'"

"Turning now to the Act itself: An examination of the title indicates its purposes. It is entitled 'An Act for preventing the manufacture, sale or transportation of adulterated or misbranded or poisonous or deleterious foods, drugs, medicines and liquors.' And, examining the particular section now in question, we find the purpose all through it to protect the public from deceit and injury. Drugs are declared

to be adulterated if their strength or purity fall below certain standards. The intent to prevent both deceit and injury is here apparent. So food is deemed to be adulterated:

“(1) If its quality or strength is reduced by the mixture of other substances;

“(2) If one substance has been substituted for another;

“(3) If a valuable ingredient has been abstracted;

“(4) If it is mixed or colored so that damage or inferiority is concealed;

“(5) If poisonous ingredients or ingredients making the article injurious to health are added;

“(6) If the article consists of decomposed or putrid animal or vegetable substances.

“The obvious purpose of provisions (1), (2), (3) and (4) is to protect the public from deceit and false pretenses; of provisions (5) and (6), from injury to health.

“Other sections of the Act also indicate the same object. The terms ‘false,’ ‘misleading,’ ‘deceive,’ ‘poisonous,’ ‘deleterious,’ appear in many places. Indeed, a careful examination of the whole Act clearly shows that its object is, as already indicated:

“(1) To prevent deceit and false pretenses in food and drugs;

“(2) To safeguard the public health.

“Bearing these objects in mind, we must now examine the sub-section of the Act especially relating to confectionery. If we find upon such examination a possible construction of the provision which would not afford protection to the public from deceit or injury, and would merely stop traffic in an article neither injurious nor capable of deceiving, we should seek to avoid it. General language should not be so construed as to ruin a legitimate business and yet remedy none of the evils the statute was designed to remove. The language of the Supreme Court of the United States in *Church of Holy Trinity v. United States*,⁵ is most pertinent:

⁵ 143 U. S. 457, 12 Sup. Ct. 571, 36 L. Ed. 226, reversing 36 Fed. 303.

“It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers. This has been often asserted, and the reports are full of cases illustrating its application. This is not the substitution of the will of the judge for that of the legislator, for frequently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act.’

“The interpretation given to the statute by the trial court was that the words ‘or other mineral substance’ following the phrase ‘in the case of confectionery: If it contain terra alba, barytes, talc, chrome yellow,’ broadly included every mineral substance, including silver. The defendant, on the other hand, contends that the different clauses of the sub-section in question should be construed together, and that so construed they embrace only those substances which are deceptive or are detrimental to health.

“Interpreting the provision as embracing in the phrase ‘or other mineral substances’ all mineral substances whatsoever, it is apparent that the use of the mineral substances salt, sulphur and baking soda, in the manufacture of confectionery—and it appears that they are so used—would render the product adulterated within the meaning of the statute and its sale unlawful. Similarly, the use of silver to coat these dragees would violate the Act. But the product in which the salt, sulphur, baking soda or silver was used would not be unhealthful nor would there be any element of deceit present. The provision so construed would arbitrarily prohibit the use of all mineral substances in confectionery, would accomplish thereby none of the purposes of the Act, and would apply a different standard in the case of confectionery than in the case of food or drugs. Unless the language of the statute

imperatively requires such construction it should not be adopted by the courts.

"The construction of the provision contended for by the defendant is in accordance with the *ejusdem generis* doctrine. The rule that when general words follow the enumeration of particular things such words will be held to include only such things as are of the same kind as those specifically enumerated is, of course, well settled. It is unnecessary to refer to more than one case to illustrate its application. Thus, in *Gundling v. City of Chicago*,⁶ the court said:

"The articles, meats, poultry, fish, butter and lard, which are expressly enumerated in the above paragraph, and the power expressly given therein to regulate the sale thereof, are articles of food for man, and include by the express enumeration of articles only provisions to be used by man. The term "other provisions," by a familiar canon of construction, can extend only to articles of the same character as those especially enumerated. When general words follow an enumeration of particular things, such words must be held to include only "such things or objects as are of the same kind as those specially enumerated." "

"We think the *ejusdem generis* rule especially applicable in this case for the reason—as already pointed out—that any broad construction would arbitrarily interfere with legitimate business and in no way promote the accomplishment of the objects of the statute. Indeed, the government, in its brief in this court, seems not to seriously controvert the proposition that the *ejusdem generis* rule should be applied. It states at the outset:

"The only question is whether metallic silver is included in the class "other mineral substances." Is metallic silver *ejusdem generis* with the mineral substances which precede it?"

"Now it appears that terra alba, barytes and talc are used to mix with confectionery and cheapen it. There is nothing in the record to show that they are injurious to health. They

⁶ 176 Ill. 340, 52 N. E. 44, 48 L. R. A. 230.

are well-known adulterants—using that term in its ordinary sense. They increase bulk and weight at the expense of quality. Confectionery containing them is really sold under false pretenses. Chrome yellow is a cheap coloring matter, and is poisonous. Silver, as used in these dragees and as considered in connection with this statute, is not the same kind of mineral substance as terra alba, barytes or talc. It is used to attract attention, not to deceive. Of course, like those minerals, it may be insoluble and inert, but the comparisons to be made must have in view the objects of the statute. Thus similarity within the rule would not be established by showing that the substances were all of the same color. So the silver upon these dragees has no similarity to chrome yellow. Unlike that mineral substance, it is not poisonous.

“In our opinion the clauses ‘or other mineral substance or poisonous color or flavor, or other ingredient deleterious or detrimental to health,’ following the enumerated substances, should be taken and interpreted together, and mean:

“(1) That the use in confectionery of terra alba, barytes, talc, or any other mineral substance, whether injurious to health or not, for purposes of deception, makes it unlawfully adulterated;

“(2) That the use in confectionery of chrome yellow or other poisonous mineral substance or poisonous color or flavor, makes it unlawfully adulterated;

“It is true that under this construction the third class of cases would include the second. ‘Any ingredient detrimental to health’ undoubtedly includes all poisonous substances. But the clauses do not conflict, and redundancy is not unusual in statutory provisions.

“Stated in another way, we think that the history of the Act, the objects to be accomplished by it and the language of all its provisions, require that it should be so interpreted that in the case of confectionery, as in the cases of food and drugs, the government should establish, with respect to products not specifically named, that they either deceive the public or are detrimental to health. And as no proof was offered in this case tending to show that the confectionery in question

was either deceptive or injurious, the defendant was improperly convicted.'”

¹French Silver Dragee Co. v. United States, 179 Fed. 824, F. I. D. 543.

“Confectionery is therefore by statute adulterated ‘if it contains terra alba, barytes, talc (or) chrome yellow.’ This much is not open to doubt.

“Next it seems to me the Court may take judicial notice of the nature of the substances declared adulterants by statute. They are all undoubtedly mineral substances;—they are not all poisonous, though all possess color. Nor can it be said that they all possess flavor in the sense of that word as applied by most people to confectionery.

“There being no punctuation between the phrase ‘or other mineral substances’ and the phrase ‘or poisonous color or flavor,’ the word ‘other’ must be held to apply to ‘mineral substance’ and ‘poisonous color or flavor.’ But the enumeration of terra alba et al. gives an illustration (so to speak) of ‘mineral substances’ and of ‘poisonous color’ (i. e., chrome yellow), but so far as I understand the nature of the articles enumerated it does not give an instance of a poisonous flavor as distinguished from poisonous color.

“Let therefore the rule so insisted upon by the defendant be applied and the Act be limited to mineral substances, poisonous colors and poisonous flavors ejusdem generis with the articles enumerated;—and it must then follow

that while the proscribed poisonous color or flavor must be a mineral substance, it does not follow that every mineral substance to be proscribed must possess either poisonous color or poisonous flavor.

“The Act is undoubtedly obscure in connecting color and flavor with substance, for strictly speaking neither color nor flavor can have substance, nor be mineral.

“I am therefore inclined to think that this statute must be construed as prohibiting the use in confectionery of all mineral substances of the same nature as those enumerated, and of those enumerated some are well known to be merely inert, possessing no poisonous qualities whatever (e. g. terra alba and talc).

“The best that can be said of silver is that it is inert, and it is just as much a mineral substance as is terra alba.

“With some doubt I overrule the demurrer.” N. J. 249 (silver dragee). French Silver Dragee Co. v. United States, 179 Fed. 543.

“The material parts of the Act pertinent to the present controversy, will be found in Section 7, and are as follows:—“That for the purposes of this Act an article shall be deemed to be adulterated * * * in the case of confectionery if it contains terra alba, barytes, talc, chrome yellow, or other mineral substance or poisonous color or flavor, or other ingredient deleterious or detrimental to health, or any vinous, malt, or spirituous liq-

§ 124. Confectionery, Use of Shellac and Other Gums.

“The Board of Food and Drug Inspection has carefully considered the evidence which has been presented at various

uor or compound or narcotic drug.’ The defendant has demurred to the information, claiming, among other things, that silver, with which the confectionery in this case is alleged to have been adulterated, is not a mineral substance of like character, with those specifically mentioned in the Act; that the information does not allege that the adulterant, to wit, silver, is an ingredient deleterious or detrimental to health, or that the strength or purity of the confectionery falls below the professed quality or standard under which it is sold. As I construe the section in question so far as it relates to the confectionery, it contains five classes of prohibited articles; the introduction of any designated ingredient of either of which violates the act; that is to say, the Act would be violated if the confectionery contained terra alba, barytes, talc, chrome yellow or other mineral substance, if it contained any poisonous color or flavor, or if it contained any other ingredient deleterious or detrimental to health; or if it contained any vinous, malt or spirituous liquor or compound thereof, or lastly, if it contained any narcotic drug. If the construction suggested is correct, then it was unnecessary that the pleader should aver that silver, the mineral substance alleged to have been introduced in this case, was ‘deleterious or detrimental to health.’ Those words are limited

to the term ‘ingredient,’ they qualify that word only, and not any preceding word or words. If a comma had been interposed after the word ‘ingredient,’ the construction would perhaps have been different. The introduction into confectionery of mineral substances, is, in my judgment, therefore prohibited irrespective of the presence of the absence of any poisonous, deleterious or detrimental quality; they are prohibited because they are adulterants, and for that reason only. Coloring or flavoring matter however, may be introduced, provided it is not poisonous, but any other ingredient, although not theretofore specified or classified, which is deleterious or detrimental to health, is prohibited. Certain specified articles are, by the first clause quoted, inferentially denominated minerals, and their use is thus prohibited, is added ‘or any other mineral substance.’ The information in brief, alleges that confectionery was shipped to the defendant and delivered in interstate commerce; that such confectionery was adulterated by having in it as one of its constituent parts silver, which is alleged to be a mineral substance. Assuming, because it is admitted by the demurrer, that silver is a mineral substance, its introduction into confectionery as an ingredient, which is also admitted, brought the confectionery within the prohibition of the stat-

times respecting the practice of coating chocolates and other confections with shellac and other gums.

"The Board is of the opinion that it is not a proper proceeding under the provisions of the Food and Drugs Act. It is evident that such coating will not only conceal inferiority, but it appears further that as a rule the gums are dissolved in alcohol. One man, in giving evidence before the Board, stated that in his opinion there was no objection to wood alcohol as a solvent. In dipping confections into an alcoholic solution of a gum a certain quantity of the alcohol must necessarily permeate the product. Evidence is adduced

ute, once it was shipped in interstate commerce. It is urged, however, that silver is not of the class of the specified mineral substance, whose use is prohibited. It must be borne in mind, nevertheless, that we are considering an Act which relates to the adulteration of food products of which confectionery is one. Silver is a mineral incapable of assimilation through the stomach. It will not yield to the processes of digestion. One of the main purposes of the Act is to prevent the introduction of such substances into food products. The title of the Act embraces adulterated foods as completely as it embraces misbranded foods, or poisonous foods, or deleterious foods. It refers to each class separately and in the alternative, and the Act deals with each class. Technical rules of construction must give way to the avowed purpose and intention of an Act. If it be that an Act admits of more than one construction, then that one will be adopted which best serves to carry out the purpose of the Act. Hence I do not feel warranted in permit-

ting the doctrine of *ejusdem generis* or other technical rule of construction to limit the scope of the Act. If silver may be used, as claimed, to beautify the confectionery, why not lead to give it weight? The language under consideration is clear and does not require for its construction, the application of technical rules. To yield to the construction of defendant's counsel would open the door for the emasculation of the Act. As to the contention that it is necessary to allege that by the use of the silver the strength and purity of the confectionery fell below the professed quality or strength under which it was sold, it is only necessary to say that that clause of the Act applies to drugs and to drugs only. It is found in the paragraph dealing with drugs and precedes that which relates to confectionery, which in turn precedes the clause relating to food. Each paragraph is dealt with separately. The clause referred to can not be read into that part of the Act which relates to confectionery. It is no part of it." N. J. 176.

showing that the product is not submitted to any subsequent process of heating whereby the traces of alcohol could be removed. Although only mere traces of alcohol may remain, the addition of these substances, and especially of wood alcohol, to a confection is specifically prohibited by the Act. Evidence is also in the possession of the Board to show that a large number of the manufacturers either never have employed this method or have discontinued it, and that goods can be, and are, made and sold in all quantities with no difficulty without the use of shellac or other gums. Evidence further shows that one of the reasons for adding the coating is that the goods may be held for a longer time. The exposure of confections for a long while before use is not advisable nor desirable.”¹

§ 125. Food Containing Filthy, Decomposed or Putrid Matter—Animal Unfit for Food—Statute.

The sixth clause of section seven of the Pure Food and Drugs Act provides that a food shall be deemed adulterated “if it consists in whole or in part of filthy, decomposed or putrid animal or vegetable substances, or any portion of an animal unfit for food, whether manufactured or not, or if it is the product of a diseased animal, or one that has died otherwise than by slaughter.”

§ 126. “Filthy,” “Decomposed” and “Putrid” Defined—Eggs.

In a charge to the jury Judge McPherson defined these words in this language:

“One section of this statute provides that articles intended for food may be condemned and forfeited ‘if, either in whole or in part, they shall be filthy, decomposed or putrid,’ and the government claims that, in this particular case, the articles in question were both filthy and decomposed. We will leave the word ‘putrid’ out of the case. There is no aver-

¹ F. I. D. 117.

ment that they were putrid. If the government has offered evidence which satisfies you that they were either filthy or decomposed, the case is made out. The government is not bound to prove that they were both filthy and decomposed.

“Now you see that what you have to do is, as a question of fact, to determine from the evidence laid before you whether these olives can fairly and properly be said to be filthy or decomposed. That requires you to consider what meaning we can properly apply to the words which I have emphasized, namely, filthy and decomposed, and then apply the meaning to the evidence as you have heard it. Right there we are confronted with the difficulty that so often confronts us, of determining just exactly what the meaning of a particular word is. You know, in the ordinary affairs of life, how difficult it often is to get at the precise meaning which a person who may be talking intends his words to bear, and he may have the same difficulty in getting at what your words may mean. It is a common difficulty that confronts the business man. Language, as you also know, very often means what we intend it to mean. There are very few words which have a precise, technical meaning, always the same. Sometimes they have one meaning and sometimes another. That is a common situation, and we simply have to do with our speech as best we can and endeavor to ascertain what it means in the particular situation in which the words are being used. Sometimes a word may mean one thing in a particular set of circumstances, and have an entirely different meaning, or, at all events, a somewhat different meaning, when applied to another subject.

“You must bear in mind that these two words, ‘filthy’ and ‘decomposed,’ are used in this case before us with reference to food, with reference to articles that are offered for food, and therefore you must view the evidence in the light of the subject matter to which your attention has been directed, because it is quite clear that a situation which might justify a jury in finding a food was decomposed might not justify them in finding that some other substance was either filthy or decomposed.

"Now the word 'filthy' is capable of a variety of meanings. I suppose it is not unfair to say that it is the superlative degree of such a condition as we refer to as 'soiled.' When we speak of an article as soiled, that would be a sufficiently accurate statement, I suppose, in your minds and mine. Then if you say an article is 'dirty,' I think you go a step farther. Perhaps you might call that the comparative degree for our purposes. It certainly goes a little farther. I think, than the word 'soiled.' Then if you use the word 'filthy,' I think you are all conscious that we have gone a step farther than that. An article can hardly be said to be filthy unless it has gone somewhat farther than the word 'dirty.'

"Now, what have the witnesses said in regard to these articles? Were they filthy, regarded as articles of food? The point to which the government directs your attention, and the only point to which the government directs your attention, in that respect, is the alleged presence of worms and the excreta of worms, which are said to have been found in these barrels. What are the facts in that regard? I do not intend to go over the evidence at all, or to direct your attention to what any particular witness may have said. You have heard the evidence and you must determine what the facts were, to what extent worms, or the excreta of worms, were found in these olives, and, when you have determined this fact, it may justify you in finding that you can properly regard them as filthy.

"So in regard to the word 'decomposed.' That is a word with quite an extensive scope. Scientifically it is quite clear that, the moment a chemical change takes place in any article, it begins to decompose. Take sugar, for example. The moment sugar begins to change its character—and it may change into a good many substances—it begins that moment to decompose, to break down, to form other combinations, and that is scientifically called the process of decomposition. It does not follow, however, that the scientific meaning is to be applied to this case. It is quite clear to all of us that it is not intended in this statute to bear a strict scientific mean-

ing; that it should mean simply a change of the chemical constituents of a substance. It is allied, if I may use a general word, to the idea that it is connoted by the word 'rotten.' 'Putrid' goes a step farther; but, as I say, we are not concerned with the stage to which the word 'putrid' may be properly applied. The sense in which 'decomposed' is used in this Act means that stage which, if carried somewhat farther, would bring you to the state of a particular substance which would properly be called rotten. I do not think it goes as far as rotten.

"Now you can see at once that the word 'decomposed,' when applied to food—and that is the subject, I call your attention again, to which you must apply these words—the word 'decomposed,' as applied to food, may have different meanings. What you would call a decomposed food product may have one meaning in one set of circumstances and a different one in another. Take certain cheeses which are used extensively as articles of food. I think on some of them—I shall not name them—there would be a general agreement that they could be properly spoken of as decomposed to some extent; and certainly with regard to some kinds of game that are eaten—eaten, at all events, by epicures—they are undoubtedly decomposed. 'High,' as you know, is often used for game when it reaches a certain stage. People sometimes do not like it, and sometimes go so far as to call it rotten. In that connection I may say that the Act of Congress is not concerned with the question as to whether some people will eat foods that are decomposed or dirty. That is not the test that is applied to them. It is quite true that some people are willing to eat articles that to others would be disgusting, and there is no standard that can be applied generally. In a Statute which has been passed by Congress, any word, speaking generally, is to have the ordinary and general meaning which is given to it in common speech. Statutes, speaking generally, you know, are addressed to the people. They are commands to the people, telling them what they shall do or omit to do, and, therefore, it is the ordinary and natural,

general meaning which the words bear, that those words have.

“Those are the rules, or principles of construction, of the words with which we are concerned in this case. Their scope and meaning are to be determined as applied to the subject matter of this statute, namely, with reference to articles of food, and you must apply these rules to the evidence in the case and determine whether these olives, about which we have heard this evidence, are properly to be spoken of as filthy, or properly to be spoken of as decomposed. If they are either one of the two; if either one of the two words is properly applicable to them; if they are filthy or decomposed, then the government has made out its case.”

In another case, Judge McPherson, in charging the jury, said:

“I dare say you all have some general idea, at all events, about the Pure Food Act, although you may not have come in contact with it quite as closely as you have the last day. This proceeding is somewhat unusual. It is not a suit against any particular person, although, in substance, in one of its aspects, it amounts to that; but it is directly a proceeding against a particular article of goods for the purpose of forfeiting it—for the purpose of condemning it. The United States declares that it is a kind of article which is forbidden to be transported in commerce between the States by the Pure Food Act, and, therefore, it may be forfeited, condemned and destroyed; and the Pure Food Act, in one of its sections, confers such power upon the courts of the United States; but, of course, before a remedy like that can be enforced—a very drastic remedy; you see, it is taking a man’s property from him, and destroying it, even although he has a trial to justify his right to it—his right to retain it—I say, a remedy like that, of course, calls for clear and satisfactory proof on the part of the United States. This is not a criminal trial, strictly speaking, because there is nobody charged with crime, but it is a suit to enforce a penalty, and a severe penalty, as I just said, and, therefore, while the burden of proof is upon the United States, it is not the ordinary burden

of proof such as exists in a civil suit between two individuals. In that case, as you no doubt know from your previous service upon juries, all that is necessary is that there shall be a fair balance of evidence in favor of one party or the other. It is not required that there should be, for example, as in a criminal case, proof beyond reasonable doubt, and that degree of proof is not required in this case, either—proof beyond a reasonable doubt, but a higher degree of proof than a mere preponderance—a mere balance of evidence in favor of the government is required. It is necessary, in a case like this, that the government should establish, by clear and satisfactory evidence, that its case has been made out. These terms are necessarily somewhat indefinite, but I can not do any better with them.

“Now, has the Government laid before you evidence of that kind and quality? That is the question for your determination. The only part of the Act to which your attention need be directed is contained in this language: ‘If the article complained of’—in this case it is a barrel of egg product—dried egg—‘consists in whole or in part of a filthy, decomposed or putrid animal or vegetable substance, then it may be condemned.’ Now, of course, this is an animal substance. It is made from eggs. It is composed wholly of that substance, as I understand. There is no evidence that there is any admixture, so that we may assume that it is wholly composed of animal substance. Now is it, therefore, filthy, decomposed or putrid? Either one of these adjectives, if applied to this substance, and established by proof, would be sufficient to justify the jury in condemning it. Now, of course, there is a certain difficulty in dealing with language always, namely, the difficulty of getting at the exact meaning which it is intended to convey, and some words—indeed, a great many words—are incapable of precise definition. Words, as you know, very often mean what we choose to have them mean. They bear the meaning that we put into them, and that meaning varies from time to time, and varies under different circumstances, and that is true about a great many words. Without troubling you longer with general remarks,

it is certainly true with regard to these particular words, filthy, decomposed or putrid. Now, if anyone attempts to make a scientific definition of these words, so as to give a precise and accurate meaning to each of them, I think he will find that he has undertaken a very difficult task. 'Filthy,' for example, might be said to be in the superlative degree of a word like soil. You speak of an article soiled, it conveys to our minds a sufficiently accurate meaning. Then if you say it is dirty, you go a step further, of course. It is pretty hard to say just what the limits are which shall describe an article as dirty, within which it may be properly described as dirty. Then when you say it is filthy, you are at once conscious that you have gone a step further, but just how far I think it will be very difficult to say—I mean to know, accurately and precisely, so that there should be no doubt at all about the limits you have.

"And take the two words that I will speak of together, decomposed and putrid; I think it is fair to say that they represent steps in the same direction. If we take the word rotten as expressing the general idea to which these two words may be referred, decomposed would probably represent a less advanced stage than putrid. I think there could not be any doubt about the word putrid, and yet there certainly would be some doubt as to where you would properly apply the word decomposed. It was said by one of the witnesses yesterday—and I thought very accurately said—that through our common experience there are certain kinds of cheeses, for example, which are eaten, and eaten extensively, but to which, certainly, the word decomposed, in some of its meanings, may properly be applied; and no doubt it is true with regard to certain other products which I need not speak of, animal and vegetable. The process of fermentation is a process of decomposition. If fermentation goes on long enough, the article falls to pieces. Sugar, when it is fermented, begins to break up; and decomposition means, of course, to break up; to decompose, to resolve into its elements. So that when fermentation has proceeded far enough it becomes decomposed, and to say just precisely where fermentation ceases

and decomposition begins would be a very difficult task. I have been speaking to you in a very general way about the effort to assign a precise meaning to such words as these, but it is not necessary for you to trouble yourself, I think, about that matter. It is a general rule, with regard to all statutes passed by the Legislature, or by Congress, that the meaning which the words bear is the usual and ordinary and everyday meaning which language is given in its common use among men. Laws are addressed to the community, and, therefore, they properly are construed in accordance with the sense which their language bears among the people that compose the community. Therefore I say, as I have just said, I think you will have very little trouble in assigning a sufficiently accurate meaning to these words. Filthy and decomposed and putrid, I think you will agree, convey a sufficiently definite meaning to the ordinary mind, and particularly—and that is what concerns us now—in relation to the subject matter about which they are applied, namely, food. It is an Act with regard to food. It is an Act with regard to pure food, and that is the effort of the statute, to see that the people get pure food; and, therefore, when a substance which professes to be food is to be condemned because it is filthy, decomposed or putrid, necessarily those words are to be applied to the subject matter of the Act, the substances that are offered for food; and, therefore, as I say, when you come to deal with that subject, as you are dealing with it, and attempt to apply these words to it, it requires the jury to say what is the condition of this substance, considered as food, offered for that purpose. Would it properly, in the ordinary use of these words, be condemned as filthy, or would it properly be condemned as decomposed or putrid? Now, I have no doubt—or, at least, I trust—you get my meaning with regard to that. You are not required to assign scientific definitions to these words at all. You are simply required to give them their ordinary and usual meaning, and then apply that to the evidence in this case, and determine whether, in either respect, this substance can be said to offend against the statute. The government's case, as I understand it, depends

solely upon the presence of these minute vegetable existences in the product. I am right about that, am I not?"

"Mr. Douglass: 'No, animal existences.'

"The Court: 'They are not always animal. Some of them are and some of them are not. Most of them are vegetable.'

"Mr. Shern: 'Organisms.'

"The Court: 'They are organisms, but the vast majority of them are vegetable. There are a few that are animal, but only a few. But, at all events, it is the presence of these organisms on which the government relies.'

"Mr. Douglass: 'Yes, sir.'

"The Court: Now, you have heard a good deal of testimony with regard to the presence of these bacteria or bacilli—I do not know exactly which word is the precise and proper word to apply, but, at all events, these very minute microscopic creatures which, within a comparatively few years, have become of great importance. Now, you have a great deal of testimony about it from these gentlemen who have made the subject a study, and I commend their testimony to you for your careful consideration. We are, necessarily, in a subject like this, obliged to rely upon the testimony of expert witnesses, and their testimony is to be given a great deal of attention, and it is for the jury to say what its value is and how far it may safely be relied upon. It may, perhaps, be difficult for the jury to come to a conclusion upon that matter, and yet there is not any other tribunal to whom that subject can be left, and especially is that the case where, as here, there is a difference of opinion among the experts with regard to the conclusion that ought to be drawn. That is not at all an uncommon situation, and it is not at all a situation—or, at least, it is not a situation that need be dwelt upon with any degree of reprobation. It is comparatively common, I may say, to speak of expert testimony with a subdued sneer, at all events, and sometimes with an open sneer. I do not think it is justified in a great majority of the cases. These gentlemen are, there is no possible reason to doubt—I am not speaking especially about the witnesses in this case, but expert witnesses generally—

they are almost always entirely honest, and desirous, to the last degree, to give the best evidence they can upon the subjects concerning which they are asked questions, but they are human, like other people. They have their own theories. They sometimes have their own biases and prejudices, which color their views, and in that subject, like the one that is before us, you can see there is a great deal of room for difference of opinion. The subject matter is one that is difficult to have accurate information on, although you may have approximate information that is substantially sufficient; and then, besides, in an examination of these substances, if a sample were taken from one part of this large package, it might be one of quality, and then besides that there may be a sample that would be of a very different quality, so that, one witness examining one sample, and one examining another, they might come to what seemed to be widely different conclusions, and are, if you regard the two samples as of the same quality; yet, if they are of different quality, of course, the differences in their testimony is accounted for. I do not think it would be either necessary or desirable for me to comment upon their testimony. Counsel have already done that sufficiently, and besides, their testimony was not difficult to understand, and I have no doubt you all understand it sufficiently for all purposes.

“From their testimony I repeat, the question for you is whether this substance was, at the time it was seized, either filthy, decomposed or putrid, with special reference to the fact that it was offered and intended as food, not whether it was going to be in the future, or whether it might be in the future, owing to the presence of these creatures—these organisms in it—but whether it was at that time of that description, because it is to that time that the government necessarily is confined.

“Now that is the case, and I do not believe I can assist you any further in the matter. I have endeavored to give you what I think is the proper method of the construction of this statute, and, as you will see, the question is a very narrow one; it is for you to determine very largely, or in

large part, by the aid of your common sense and common knowledge with regard to the meaning of these words. I can not say to you definitely what they mean. It is for you to say what they mean—the kind of words I have given you. Of course, you have not any arbitrary right on that subject, but what their meaning is, is what they mean to the ordinary citizen to whom they are addressed. They have not, as I conceive in this statute, a precise and scientific definition. Their meaning must be determined by a consideration of the subject matter about which they are dealing, namely, pure food—as pure food as possible—and in that light the jury, with the instructions I have given them, must determine the question. Your verdict in the case would simply be in favor of the United States if you find that this substance should be condemned, or in favor of the claimant if you find that the government has not made out its case, tested by the rule with regard to the burden of proof to which I have referred.’

“Mr. Shern: ‘Will Your Honor allow me to make a suggestion? Of course, the jury know better, but the newspapers have been full of this case, and I would like the jury to govern themselves by what they have heard in court, and not be actuated by any other comment.’

“The Court: ‘Not all the newspapers were full of it, for I have not seen a word about it; but there may have been some, as there doubtless are, if Mr. Shern’s information is accurate. Doubtless some may have had comments about it. I do not know whether the jury have seen them. However, if they have, I am sure they will dismiss it from their minds, and decide the case upon the evidence and the instructions of the court.’ ”

ART. II.—SPECIFIC ARTICLES OF FOOD.

SEC.

- 127. Ale.
- 128. Almond extract.
- 129. Annatto.
- 130. Apples, evaporated.

SEC.

- 131. Apple jelly.
- 132. Banana extract.
- 133. Berry preserves.
- 133a. Blackberry cordial.

* See also Section 115 for a definition of “decomposed.”

- | SEC. | SEC. |
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| 134. Bone grits. | 174. Macaroni. |
| 135. Boric acid. | 175. Maple syrup. |
| 136. Brandy. | 176. Meat—Fish. |
| 137. Buckwheat flour. | 177. Milk and cream. |
| 138. Butter. | 178. Milk, evaporated. |
| 139. Calcium acid phosphate. | 179. Mince meat. |
| 140. Corn syrup. | 180. Mineral oil. |
| 141. Canned corn. | 181. Mineral water. |
| 142. Cereal. | 182. Molasses. |
| 143. Cheese. | 182a. Mustard, Cherlock as a Sub-
stitute for. |
| 144. Cherry syrup. | 183. Oats. |
| 145. Cider. | 184. Olives. |
| 145a. Chocolate cremolin. | 185. Olive oil. |
| 146. Cloves. | 186. Oysters—Shellfish. |
| 147. Coffee. | 186a. Peaches. |
| 148. Copper salts used to green
vegetables. | 187. Peach butter. |
| 149. Corn cob. | 188. Peach extract. |
| 150. Corn flour and meal. | 189. Peanuts. |
| 151. Cotton seed meal. | 190. Pepper. |
| 152. Currants. | 191. Phosphate, apple. |
| 153. Custard. | 192. Phosphoric acid. |
| 154. Eggs. | 193. Pineapple extract. |
| 155. Essence of wintergreen. | 194. Poison. |
| 156. Figs. | 195. Prunes. |
| 157. Fish. | 196. Raisins. |
| 158. Flour. | 197. Rice. |
| 159. Flavoring extracts. | 198. Rococola. |
| 160. Formaldehyde. | 199. Saccharin in food. |
| 161. Fruits and vegetales. | 200. Sago and tapioca. |
| 162. Gin. | 201. Salts of tin. |
| 163. Glucose. | 202. Shellac and other gums for
coating chocolates and other
confection. |
| 163a. Hominy. | 202a. Soda water—Syrup cola. |
| 164. Honey. | 203. Stock feed. |
| 165. Hydrocyanic acid. | 204. Sugar in canned fruits and
vegetables. |
| 166. Ice. | 205. Tea. |
| 167. Ice cream. | 206. Tomato catsup, paste and pulp. |
| 167a. Jamaica Ginger. | 206a. Turmeric. |
| 168. Jam compound—Jelly. | 207. Vanilla and caramel. |
| 169. Kola-Ade. | 207a. Vani-Kola. |
| 170. Koca-Nola. | 208. Vinegar. |
| 171. Koa-Kola. | |
| 172. Lemon and orange flavoring. | |
| 173. Lemon oil. | |

SEC.

209. Waffles.

210. Whisky.

SEC.

211. Wine.

§ 127. Ale.

To substitute fermented beer for cream ale in part is to adulterate the latter.¹

§ 128. Almond Extract.

Almond extract, or flavor, as recognized by reliable manufacturers and dealers, is the flavoring extract as prepared from oil of bitter almonds, free from hydrocyanic acid, and contains not less than one percent by volume of oil of bitter almonds. Hydrocyanic acid, therefore, used in it is an adulterant.¹

§ 129. Annatto.

Annatto used in milk to give it color is an offense.¹

§ 130. Apples, Evaporated.

To sell moldy and rotten portions of apples, worms, seeds, and general apple waste product for "choice evaporated apples" is a violation of the statute.¹ To soak evaporated apples in water is to adulterate them.²

§ 131. Apple Jelly.

Glucose used for sugar in apple jelly adulterates it.¹ So apple jelly containing free sulphuric acid is adulterated.²

¹ N. J. 834.¹ N. J. 142. See also Wiley, Food Adulteration 396, and Leach on Food Analysis 873.¹ N. J. 586. How detected, Leach on Food 175.¹ N. J. 519; N. J. 457; N. J. 367; N. J. 255; N. J. 949; N. J. 976; N. J. 978.² N. J. 504. See N. J. 87; N. J.

89; N. J. 36; N. J. 57; N. J. 64;

N. J. 457. Evaporated apples are apples dried by artificial means,

Wiley, Food Adulteration 335.

¹ N. J. 238; N. J. 811.² N. J. 811.

§ 132. Banana Extract.

Selling an imitation of banana extract as pure banana extract is an offense.¹

§ 133. Berry Preserves.

Logan berry preserves substituted for blackberry preserves is an adulterant.¹

§ 133a. Blackberry Cordial.

To use glucose, saccharin, benzoic acid, and artificial coloring matter in the form of a coal tar dye, in the making of blackberry cordial is to produce an adulterated article.¹

§ 134. Bone Grits.

Imitation of bone grits that does not contain any bone is an adulterated product.¹

§ 135. Boric Acid.

Boric acid used in biscuits is a violation of the statute, being an adulterant.¹ So boric acid and its salts used in ice cream cones and ice cream clams is an adulterant, subjecting it and them to forfeiture.² Boric acid used in eggs is an adulterant.³

§ 136. Brandy.

Imitation brandy put into cognac is an adulterant.¹

§ 137. Buckwheat Flour.

To mix rye and wheat flours with buckwheat flour is to

¹ N. J. 405. Imitation banana essence is made up of a mixture of amyl acetate and butyric ether, Leach on Food Analysis 884.

¹ N. J. 701; N. J. 509.

¹ N. J. 926.

¹ N. J. 625 (Hen-e-ta Bone Grits).

¹ N. J. 696.

² N. J. 672; N. J. 669; N. J. 668.

³ N. J. 657; N. J. 508; N. J. 790. How detected in foods, Leach on Food Analysis 182, 822.

¹ N. J. 683.

adulterate the latter,¹ and so to mix corn meal with the buckwheat flour.²

§ 138. Butter.

The coloring of butter is not unlawful, that course being distinctly allowed by the Act of August 2, 1886.¹ Butter containing filthy, decomposed and putrid animal and vegetable substances is adulterated.² So is butter that contains an excessive amount of water.³

§ 139. Calcium Acid Phosphate.

Corn starch used in calcium acid phosphate does not render the mixture deleterious or in any way dangerous to the health of the person eating the mixture.¹

§ 140. Cane Syrup.

To mix corn syrup or glucose with cane syrup is to adulterate the latter.¹

§ 141. Canned Corn.

Canned corn that consists in part of filthy, decomposed, and putrid vegetable substances is denounced by the statute.¹

§ 142. Cereal.

Cereal made out of oats is adulterated if wheat flour is mixed with it.¹

¹ N. J. 481; N. J. 317; N. J. 60; N. J. 118; N. J. 129.

² N. J. 31; N. J. 60; N. J. 124. See Wiley, Food Adulterations 221. Composition, Leach on Food Analysis 271.

³ 24 U. S. Stat. at Large 209. See Wiley, Food Adulteration 185.

⁴ N. J. 812.

⁵ N. J. 836.

⁶ N. J. 300; N. J. 656.

⁷ N. J. 324; N. J. 106. Composition, Wiley, Food Adulteration 476, Leach on Food Analysis 566.

⁸ N. J. 471. See Wiley, Food Adulteration 228. Antiseptics in, Leach on Food Analysis 903.

⁹ N. J. 105; N. J. 96.

§ 143. Cheese.

To use starch in cheese is to adulterate it.¹ Neufchatel cheese made out of skimmed milk is adulterated.² Under Act of June 6, 1896,³ cheese may be colored with a harmless coloring matter.⁴ To use boric acid or borate in cheese is to adulterate it.⁵

§ 144. Cherry Syrup.

Cherry syrup so colored as to hide its adulteration and inferiority may not be so sold.¹

§ 145. Cider.

To mix saccharin, benzoic acid, dye and water with cider is to adulterate it.¹

§ 145a. Chocolate Cremolin.

A product purporting to contain "powdered cocoa and a little harmless coloring" is adulterated if it contains 5.96 percent of ferric oxide and twelve parts of arsenic per million.¹

§ 146. Cloves.

To abstract oil from cloves and then to color, coat or stain them so as to deceive the purchaser as to their true condition is condemned by the statute.¹

§ 147. Coffee.

Coffee coated with lead chromate is forbidden by the Food

¹ N. J. 344.

² N. J. 291.

³ 29 U. S. Stat. at Large 253.

See Appendix.

⁴ F. I. D. 51.

⁵ N. J. 790. See Wiley on Food Adulteration 190, and Leach on Food Analysis 201, for dissertation on cheese and its adulteration.

¹ N. J. 549; N. J. 372.

¹ N. J. 615. Adulteration, Leach, Food Inspection 682.

¹ N. J. 989. Adulteration, Leach, Food Inspection 402.

¹ N. J. 529; N. J. 888. Adulteration, Leach, Food Inspection 418.

and Drugs Act.¹ To use chicory in coffee is to adulterate it.² Filthy coffee can not be sold.³ Maracaibo coffee mixed with Java and Mocha adulterates them;⁴ and so if coated with lead chromate.⁵ Java coffee containing South American coffee is adulterated;⁶ or Dutch East India coffee, known as Padang.⁷

§ 148. Copper Salts to Green Vegetables.

“Until further notice, vegetables greened with copper salts, but which do not contain an excessive amount of copper and which are otherwise suitable for food, will be allowed entry into the United States, if the entry bears the statement that sulphate of copper or other copper salts have been used to color the vegetables.¹

“The attention of the Board of Food and Drug Inspection has been directed to the shipment in interstate commerce of green, immature citrus fruits, particularly oranges, which have been artificially colored by holding in a warm, moist atmosphere for a short period of time after removal from the tree. Evidence is adduced showing that such oranges do not change in sugar or acid content after removal from the tree. Evidence further shows that the same oranges remaining on the tree increase markedly in sugar content and decrease in acid content. Further, there is evidence to show that the consumption of such immature oranges, especially by children, is apt to be attended by serious disturbances of the digestive system.

“Under the Food and Drugs Act of June 30, 1906, an article of food is adulterated ‘if it be mixed, colored, powdered, coated, or stained in a manner whereby damage or inferiority is concealed.’ It is the opinion of the board that oranges treated as mentioned above are colored in a manner

¹ N. J. 563; F. I. D. 80.

⁶ N. J. 841.

² N. J. 530; N. J. 407; N. J. 714.

⁷ N. J. 841. Adulteration, Leach, Food Inspection 384.

³ N. J. 383; N. J. 714.

¹ F. I. D. 102, issued December 26, 1908. This decision practically supersedes F. I. D. 92.

⁴ N. J. 215, 951.

⁵ N. J. 50.

whereby inferiority is concealed and are, therefore, adulterated.

"The board recognizes the fact that certain varieties of oranges attain maturity as to size, sweetness and acidity before the color changes from green to yellow, and this decision is not intended to interfere with the marketing of such oranges."²

§ 149. Corn Cob.

Five percent of corn cob used in a food is an adulterant.¹
So is ten percent used in middlings.²

§ 150. Corn Flour or Meal.

To offer for sale corn flour or meal that is in a filthy condition and infested with worms and other animal matter is an offense.¹

§ 151. Cottonseed Meal.

Cottonseed hulls mixed with cottonseed meal adulterates it.¹

§ 152. Currants.

The sale of currants which are filthy, decomposed and in a putrid condition is forbidden by the statute.¹

§ 153. Custard.

Custard can not be made without eggs; and to substitute corn starch will result in an adulterated product.¹

²F. I. D. 133. Use in canned peas. Wiley, Food Adulteration 313. Coal-tar colors allowed, Leach, Food Inspection 792.

¹N. J. 315; F. I. D. 119.

²N. J. 314.

¹N. J. 396. Preparation of corn meal, Wiley, Food Adulteration 230.

¹N. J. 109; N. J. 179; N. J. 759; N. J. 794. Nature and Composition, Leach, Food Adulteration 516.

¹N. J. 531; N. J. 188.

¹N. J. 166. Custard Powders, Leach, Food Inspection 269.

§ 154. Eggs.

Filthy, decomposed, or putrid animal or vegetable substance used in desiccated eggs is an adulterant.¹ Desiccated egg product which contains an excessive number of bacterial organisms, of which many are of a gas-producing type, and also containing streptococci, and is composed of filthy and decomposed matter, is unfit for food.² Boric acid used in eggs is an adulterant.³ Formaldehyde put in canned liquid eggs is an adulterant.⁴ Where "egg noodles" were worm eaten, and contained cast skins of larvae, excreta, a few dead worms, and several large beetles, they were ordered destroyed.⁵ In a case where the information charged that the eggs contained formaldehyde, were adulterated, filthy, decomposed and frozen the court charged the jury as follows:

"Gentlemen, the Act of Congress under which this information is brought, and about which so much is heard nowadays, not only in the court room but in the public print, is (in its application to this particular transaction) as follows: The introduction into any State from another State of any article of food which is adulterated is prohibited, and the person who ships such article of food from one State to another (and person means corporation also), shall be guilty of a misdemeanor.

"Now the word 'adulterated' is of course one of very wide, or rather uncertain meaning, and therefore for the purpose of this Act is defined with great particularity as meaning in the case of food, two things, which are relevant to this trial: An article of food is adulterated if it contains any added poisonous or other added deleterious ingredient

¹ N. J. 682; N. J. 686; N. J. 676; N. J. 618; N. J. 614; N. J. 537 (frozen); N. J. 486 (frozen); N. J. 462 (frozen); N. J. 377 (frozen); N. J. 362; N. J. 359; N. J. 305; N. J. 295; N. J. 292; N. J. 227; N. J. 46; N. J. 103; N. J. 782 (frozen); N. J. 736 (frozen); N. J. 1005; N. J. 878; N. J. 890;

N. J. 938; N. J. 969; N. J. 970; N. J. 974; N. J. 1027.

² N. J. 665; N. J. 613; N. J. 747.

³ N. J. 657; N. J. 508.

United States v. Buffalo Cold Storage Co., 179 Fed. 865; N. J. 482.

⁴ N. J. 224.

⁵ N. J. 734.

which may render such article injurious to health. It is also for the purpose of this Act deemed adulterated (although the word can not be used in that sense ordinarily), if it consists in whole or in any part of a filthy, decomposed or putrid animal or vegetable substance.

“The Act then continues, although the rest of this section does not I think relate to this case, but it shows the general scope of the Act, ‘or if it consists of any portion of an animal unfit for food, whether manufactured or not, or if it is the product of a diseased animal, or one that had died otherwise than by slaughter.’ I have read that merely to show the general scope of legislation in this regard.

“What is charged in this information and what is therefore on trial before you, is composed of two parts, that is, the charge is of two parts. The first is, that these eggs which are the subject of investigation contained formaldehyde, and it is said that formaldehyde is a deleterious ingredient which may render an article injurious to health; and it is also charged, irrespective of the formaldehyde, that the eggs themselves were filthy, decomposed or putrid. Now, probably there is nothing so difficult in the world as a definition; sometime when you have an opportunity, try to make an accurate full complete definition of anything, say a coat, and you will find it very hard; but from dictionaries and from the questions put to witnesses, and the study I have given the matter; I charge you that the meaning of the word ‘putrid’ is, that a putrid substance is in such a state of decay as to be fetid or stinking from rottenness; an article which is decomposed is an organic body (as are eggs), reduced or being reduced to a state of dissolution by the processes of a natural decay, and an article which is filthy or dirty, noisome or nasty.

“Take up the last word first; after some consideration I have concluded and so instruct you that inasmuch as it is a matter of common knowledge that an egg is not of itself dirty, such an article, namely, an egg, may become putrid or decomposed by the simple process of decay and the resultant or natural causes, but it will not become filthy, unless some-

thing be added thereto which renders it dirty, noisome or nasty.

“There is no evidence in this case that the eggs which are the subject of this investigation, had become filthy in that sense; therefore you will divide your consideration of this case into two parts: The first inquiry is, was there formaldehyde added to these eggs, and if there was formaldehyde added to these eggs, what is the nature of formaldehyde, both of which are questions of fact. On the other hand, you have a statement of defendant’s president, that he is the manager of the business, and that in that business, the defendant so far as he knew, never bought any formaldehyde since it was in operation. On the other hand, you have the statement of the chemist who testified that formaldehyde by well-known scientific tests was found to be present in the product when it was examined in Washington, and that, just like every other question of fact, is for your consideration alone.

“If you find there was formaldehyde in this substance, then it appears to me you would be justified in inferring from the evidence on both sides that formaldehyde is what is known as an irritant; that is, it produces such a condition of irritation of the soft linings of the digestive tracts that if taken in sufficient quantity, it is injurious to human health. If, therefore, on the first branch of the case, you should be of the opinion that the eggs, no matter how bad they were, or how good they were, did contain formaldehyde, and you should be sure of the opinion that formaldehyde has a discoverable odor and was an ingredient so deleterious, that it might render the eggs injurious to health, then the government has maintained that branch of the proposition.

“But entirely irrespective, as I have said, of the presence or absence of formaldehyde, the government’s contention is that the eggs were putrid and decomposed. But there was no smell discernible, so you have come to the formaldehyde proposition, because it is said that formaldehyde disguises smell. But you have further to determine (irrespective of formaldehyde, and irrespective of putridity) whether the de-

composition of these eggs had progressed so far that the eggs were in common parlance rotten.

“Now, to approach this question, as in an every day business manner; it is perfectly fair to ascertain what it is, that you would have asked for, if you wanted to buy the article that Worischeck bought? The trade name by all the evidence appears to be frozen eggs. What are frozen eggs? In the first place, they are broken. Naturally, the inquiry arises why are they broken? In the next place, the contents of the egg shell are strained through a sieve-like article; and the inquiry is perfectly natural: why are they strained? In the next place the whites and yolks are mixed. Again the inquiry, why? When the product, strained and mixed, was collected in the month of February, 1910, the trade price at which those articles were sold, was eighteen cents per pound, which according to the witnesses who averaged nine eggs to the pound, makes twenty-four cents per dozen; and tanner’s eggs are worth four cents per pound. Why was all this done; what is the effect of the freezing, and what is the effect of the preservative formaldehyde, if there was a necessity for a preservative, and if there was in fact formaldehyde present?

“It appears to me, that by all the testimony, the action of both cold and preservative, if there was any, was to arrest decay; further, I think it is perfectly fair to assume by all the testimony, leaving however the question of fact to you, that eggs are frozen, and the commercial article of frozen eggs exists for the purpose of arresting decay in the eggs so frozen.

“Now, it is to be remembered that this is an article of food, and if an article of food be in such a state that it be deemed desirable to arrest decay by cold or preservatives or both, then it follows that in that article (as testified to by both sides and all of the scientific experts here) when the cold is removed, and the action of the preservative is exhausted, decomposition will reassert itself, and progress even more rapidly than before.

“The question, therefore, would seem to be perfectly fair,

can a person who deals in frozen eggs, or other articles that may be preserved by cold or otherwise from the process of decay, such preservation being temporary only, rely upon instant use? What is reasonably to be expected, if an article is sent forth in trade for sale and distribution; and in the particular case of frozen eggs, what is to be expected in the distribution and sale thereof to bakers, for insertion into such articles of their product as may require eggs.

"So, according to my understanding, when those eggs went to Washington on February 12th or two days after they were sold, you are asked to believe by the prosecution that the eggs were then in such condition as would reasonably be expected by any person who put them forth for food consumption, unless they were to be eaten, absolutely frozen.

"Now, so far as the scientific knowledge which has been exposed to us, I am frank to say that a great deal of it falls off me, and I strongly suspect that a great deal falls off you, very much like the proverbial water off a duck's back; but I think that this result may be taken to have been shown by the scientists on both sides: There may be bacteria or bacilli without decomposition, but there can not be decomposition without the presence of bacilli or bacteria. Decomposition when carried far enough will usually result in organic bodies in putrefaction, which is an advanced stage of decomposition, with a fetid odor; the odor of putrefaction can be temporarily concealed by certain chemicals, of which formaldehyde is one.

"Now, says the government, from the quantity and kind of bacteria discernible in this particular shipment of eggs,—it is for you to say whether at a time, and in a condition that might reasonably have been expected as the time and condition of consumption,—do the eggs show such an advanced stage of decomposition as to bring them under the condemnation of the Act, which I interpret, to the best of my knowledge, to mean that those eggs were in common parlance rotten eggs.

"This, gentlemen, I believe to be the whole case. Returning again to the two propositions, which I have before indi-

cated; if you are of the opinion that formaldehyde was present in the shipment in question, if you are further of the opinion that formaldehyde is a deleterious ingredient, that may render the article containing it injurious to human health, that alone is sufficient to warrant a verdict of guilty. If you are of the opinion that there was no formaldehyde, and if you are further of the opinion that the eggs were not in such a state of decomposition as to entitle them to be termed rotten, then you should bring in a verdict of not guilty.

"In this case, no matter whether the person or party proceeded against is a corporation or not, this being a criminal case, it is just as necessary to find the result to which you arrive in favor of the prosecution beyond a reasonable doubt, as in any other case. During other trials in which you jurors of the present panel have been sitting, I have had occasion to define the meaning of the words reasonable doubt; I do not think it is necessary to repeat it. I assume I am talking to intelligent men."

¹ N. J. 825.

Eggs unfit for use shipped by their owner from Missouri to Illinois to be there used in his own bakery in cakes may be condemned. *United States v. Two Barrels of Eggs*, 185 Fed. 702.

In one case the court said: "Under the second clause of the seventh section, I shall dismiss the government's charge at once. I do not think under the evidence in the case, that that clause has been violated; that is, I do not think that the egg product in question is adulterated within the meaning of the second subdivision of section seven. It is the very article that it was intended to be—the very article that was intended to be made and

sugar was a part of that article. That is not a case of misbranding. The article is made under a patent, or at least a similar article is patented—and I do not think the introduction of sugar under the circumstances disclosed, adulterates the article within the meaning of the Act. It is made just as it was ordered and as it was directed to be made; that being so it is not clear why sugar adulterates the article any more than the putting of salt and pepper into canned soup would adulterate that article, assuming that the soup was to be seasoned." N. J. 1027. *Nature and Composition of Eggs*, Leach, Food Inspection 261; Wiley, Food Adulteration 112.

§ 155. Essence of Wintergreen.

A dilute essence of wintergreen containing less than one-half the necessary amount of wintergreen, and artificially colored in imitation of essence of wintergreen of full strength, is forbidden by the statute.¹

§ 156. Figs.

Figs that are filthy, moldy and decomposed are adulterated.¹

§ 157. Fish.

To offer for sale fish—as sardines—that consists in part of a filthy, decomposed and putrid animal substance, is an offense.¹

§ 158. Flour.

To use wheat flour in rye flour is to adulterate the latter.¹ To bleach flour by mixing with it bleaching gas and by the use of electricity, whereby an inferior flour is made to appear as one of superior quality, is forbidden by the statute.² Flour bleached with nitrogen peroxid is adulterated.³ In one case, where flour had been treated by the Alsop process, the court made the following finding, and ordered 1,200 sacks of flour destroyed:

(a) Certain substances known as nitrites, nitrite reacting material, and nitrogen peroxid gas had been mixed and packed with said flour so as to reduce, lower and injuriously affect its quality and strength in these respects, viz., that the capacity of said flour to change and improve as it would have changed and improved if aged and conditioned by natu-

¹ N. J. 293; N. J. 936. Adulteration; Leach, Food Inspection 878.

¹ N. J. 813.

¹ N. J. 395; N. J. 282; N. J. 257 (herring); N. J. 1021 (shad in cold storage). On adulteration see

Wiley, Food Adulteration 152; Leach, Food Inspection 255.

¹ N. J. 354; N. J. 497; F. I. D. 42.

² N. J. 382 (the Alsop process).

³ N. J. 100.

ral processes, had been destroyed; that the elasticity of the gluten content of said flour had been lessened and impaired and other ingredients of said flour had been injuriously affected so as to reduce, lower and impair its bread-making qualities;

(b) Said flour had been and was mixed, colored and stained in a manner whereby damage and inferiority was concealed in these respects, among others, viz., that the inferiority or freshness or newness, an inferiority which is present in flour made from new wheat or in flour freshly milled from wheat that is either old or new, and an inferiority which manifests itself, among other things, in color, elasticity of gluten, and the quality of other ingredients which affect its value for bread-making purposes, had been and was concealed, and said flour had been caused to simulate the appearance of flour made from wheat properly aged and conditioned by natural processes and of flour which had been properly aged and conditioned by natural processes after being milled, and that said treatment by the Alsop process concealed the inferiority of said flour by giving it the appearance of a better grade of flour than it really was;

(c) Said flour had been caused to contain and did contain added poisonous or other added deleterious ingredients, to wit, nitrites, nitrite reacting material and nitrogen peroxid gas. which may render said flour injurious to health.⁴

§ 159. Flavoring Extracts.

An artificial compound,¹ made out of alcohol and other chemicals to imitate the flavor of strawberry, substituted wholly for the genuine article, and artificially colored to conceal its inferiority, can not be sold without a violation of the statute.²

⁴ N. J. 722. On bleaching and adulteration see Wiley, Food Adulteration 247, 248; Leach, Food Inspection 315, 321.

² N. J. 339; N. J. 246; N. J. 218; N. J. 122; N. J. 143; N. J. 892; N. J. 939; N. J. 1029. Leach, Food Inspection 849 to 886.

¹ See Lemon and Orange Flavoring.

§ 160. Formaldehyde.

Formaldehyde put in cream (or any other food) to preserve it is both an adulteration of it and the adding to it of a poison.¹

§ 161. Fruits and Vegetables.

To offer for sale or sell filthy, decomposed and putrid vegetables is an offense.¹ So any article of food made out of filthy, decomposed and putrid vegetables is liable to seizure and destruction, such as catsup,² or canned tomatoes,³ or peaches that are decayed, filthy and covered with mold.⁴

§ 162. Gin.

Salicylic acid, brucine and strychnine, put in gin, adulterates it.¹

§ 163. Glucose.

To use in preserves a greater percent of glucose than the label specifies the article of food on which it is placed contains, is an adulteration, and renders the manufacturer liable to a penalty.¹ Commercial glucose of 4.9 percent used in apple-butter is an adulterant,² or 65.8 percent, instead of 50 percent, in corn syrup and sorghum compound.³ Glucose used in a jam compound for sugar is an adulterant of it,⁴ and so in peach butter, although not used as a substitute for sugar,⁵ or in alleged pure maple syrup.⁶ Glucose used in cane syrup is an adulterant.⁷

¹ N. J. 513; N. J. 224. See also N. J. 825.

² N. J. 701 (berries); N. J. 695 (pineapples); N. J. 599; N. J. 813.

³ N. J. 670; N. J. 622; N. J. 604; N. J. 388; N. J. 156.

⁴ N. J. 671; N. J. 555.

⁵ N. J. 153.

⁶ N. J. 245 (damiana gin). Composition. Leach, Food Inspection 744.

¹ N. J. 703.

² N. J. 702.

³ N. J. 699.

⁴ N. J. 602.

⁵ N. J. 592.

⁶ N. J. 384.

⁷ N. J. 324. Use of glucose for adulteration. Wiley, Food Adulteration 480; Leach, Food Inspection 575.

§ 163a. Hominy.

Hominy having in it filthy and decomposed vegetable matter is adulterated.¹

§ 164. Honey.

To use in honey invert sugar and glucose, even in small quantities, is to adulterate it.¹

§165. Hydrocyanic Acid.

Hydrocyanic acid used in vanilla is an adulterant.¹

§ 166. Ice.

A filthy and deleterious ingredient, consisting wholly or in part of a filthy, decomposed and putrid animal and vegetable substance, in ice, adulterates it.¹

§167. Ice Cream—Homogenized Butter and Skimmed Milk.

Ice cream made of gelatin and milk is adulterated.¹ Ice cream from which the butter fat has been extracted is adulterated.² To use boric acid in ice cream cones is to violate the statute.³

“Investigations have shown that there has lately come into use in the trade an apparatus known as a ‘homogenizer,’ which has the faculty of so disrupting the globules of fat that a whole milk homogenized does not permit the separation of the cream through the ordinary gravity methods. In like manner butter or other fat, and skimmed milk, passed through the homogenizer, form a product from which the butter does not separate on standing, and which resembles in its other physical characteristics whole milk.

¹ N. J. 923.

¹ F. I. D. 18; F. I. D. 20; F. I. D. 21. See N. J. 269 and N. J. 352. Adulteration. Wiley, Food Adulteration 493.

¹ N. J. 142. Detection. Leach, Food Inspection 877.

¹ N. J. 299.

¹ N. J. 438; N. J. 213.

² N. J. 430; N. J. 425.

³ N. J. 724; N. J. 725; N. J. 814; N. J. 831; N. J. 899; N. J. 911.

“Investigations have further shown that butter and skimmed milk are passed through the homogenizer to form a so-called ‘cream,’ which is used in place of real cream in the manufacture of ice cream.

“The board is of the opinion that skimmed milk and butter fat in appropriate proportions passed through the homogenizer are not entitled to the name of ‘milk’ or the name of ‘cream,’ as the case may be, according to the quantity of fat which is present. The board is further of the opinion that the product made from a homogenized butter or skimmed milk can not be properly called ‘ice cream.’ ”⁴

§ 167a. Jamaica Ginger.

Jamaica ginger not over one half the standard of that article is adulterated.¹

§ 168. Jam Compound—Jelly.

To substitute in a jam compound glucose for sugar is to adulterate it.¹ A jam that is “infiltrated with yeast, and mold with a few mites and eel larvae present, the yeast odor pronounced,” or one containing “yeast spores and mold abundantly,” or one containing an abundance of mold with a considerable number of mites and a great abundance of spores present, indicating that smut-infected figs were used, is adulterated and unfit for food.² A substance labeled “jelly,” containing free sulphuric acid and benzoate of soda, and not a jelly, but a viscous syrup with a fruit flavor, is adulterated.³

§ 169. Kola-Ade.

Cocaine and coca-leaf alkaloids used in a soft drink are forbidden by the statute.¹

⁴ F. I. D. 132. Leach Food Inspection 198.

¹ N. J. 936; N. J. 920.

¹ N. J. 602.

² N. J. 716.

³ N. J. 811. See Wiley, Food Adulteration 375, and Leach, Food Inspection 911.

¹ N. J. 310.

§ 170. Koca-Nola.

Koca-Nola in which cocaine is used in an appreciable quantity is adulterated.¹

§ 171. Kos-Kola.

Cocaine used in Kos-Kola is forbidden by the statute.¹

§ 172. Lemon and Orange Flavoring.

A dilute solution of alcohol used in lemon flavor is an adulterant.¹ Extract of Lemon (Baker), Soluble Terpeneless Citrol, which consists of highly dilute terpeneless extract of lemon, containing only 0.04 percent of citrol, and practically no oil of lemon, is adulterated.² And the same is true of Extract of Orange. Soluble Terpeneless.³ Lemon flavoring containing no oil of lemon, and containing a dye known as naphthol yellow S, substituted in whole or in part for the lemon extract, is adulterated.⁴ Substituting in terpeneless lemon extract water for citrol so as to reduce the proportion of citral in the product to one-hundredth of one percent of the total constituents in the article, is an adulteration of the lemon extract, which contains not less than one-fifth of one percent by weight of citrol.⁵ To color lemon flavoring with a coal-tar dye is an offense.⁶

§ 173. Lemon Oil.

To mix the vegetable oil known as "sesame" oil with lemon oil is to adulterate it.¹

¹ N. J. 202.

² N. J. 296.

³ N. J. 689; N. J. 444; N. J. 313; N. J. 939.

⁴ N. J. 661; N. J. 444; N. J. 339; N. J. 281; N. J. 279; N. J. 277.

⁵ N. J. 661; N. J. 339; N. J. 279 (orangeade).

⁶ N. J. 660; N. J. 644; N. J. 637; N. J. 627; N. J. 532; N. J. 807.

⁷ N. J. 601; N. J. 807; N. J. 1029.

⁸ N. J. 585; N. J. 536; N. J. 534; N. J. 444; N. J. 408; N. J. 115; N. J. 130; N. J. 147; N. J. 149; N. J. 152; N. J. 939.

For a discussion of this phase of the subject, see the opinion of Judge Hollister, N. J. 823. Adulteration, Leach, Food Inspection 862.

⁹ N. J. 505; N. J. 259.

§ 174. Macaroni.

Martius' yellow, used in the manufacture of macaroni, is an adulteration. It is a poison which will kill.¹

§ 175. Maple Syrup.

To add water in addition to the quantity of water which is a proper constituent of maple syrup, whereby the strength of the syrup is reduced, is an adulteration.¹ To mix cane-sugar syrup with maple syrup is an adulteration of the latter;² so of glucose mixed with maple syrup.³

§ 176. Meat—Fish.

It is a violation of the Pure Food Law to sell filthy, decomposed or putrid fish that is unfit for human consumption.¹

§ 177. Milk and Cream.

Water used in milk is an adulterant, and to abstract from milk butter fat is a violation of the statute.¹ Milk that contains a filthy, decomposed and putrid animal substance, and that has been skimmed and a large portion of the fat re-

¹ N. J. 658. Composition. Wiley, Food Adulteration 260.

¹ N. J. 603 (In this case five and one-half percent of water was added).

² N. J. 591; N. J. 412; N. J. 290; F. I. D. 98; N. J. 802; N. J. 1015; N. J. 928.

³ N. J. 384; N. J. 198. Composition. Wiley, Food Adulteration 472. Adulteration. Leach, Food Inspection 572.

¹ N. J. 666; N. J. 664.

¹ N. J. 680; N. J. 674; N. J. 673; N. J. 638; N. J. 632; N. J. 629; N. J. 628; N. J. 607; N. J. 590; N. J. 588; N. J. 587; N. J. 558 (fat abstracted from cream); N. J. 557; N. J. 538; N. J. 528; N. J. 527; N.

J. 526; N. J. 525; N. J. 524; N. J. 523; N. J. 522; N. J. 517; N. J. 515; N. J. 514; N. J. 512; N. J. 510; N. J. 503; N. J. 502; N. J. 485; N. J. 484; N. J. 460; N. J. 451; N. J. 446; N. J. 445; N. J. 437; N. J. 423; N. J. 421; N. J. 420; N. J. 419; N. J. 370; N. J. 347; N. J. 338; N. J. 336; N. J. 335; N. J. 331; N. J. 312; N. J. 308; N. J. 307; N. J. 287; N. J. 285; N. J. 268; N. J. 267; N. J. 265; N. J. 264; N. J. 241; N. J. 229; N. J. 228; N. J. 219; N. J. 214; N. J. 206; N. J. 11; N. J. 8; N. J. 81; N. J. 88; N. J. 132; N. J. 125; N. J. 185; N. J. 753; N. J. 787; N. J. 788; N. J. 719; N. J. 979.

moved from it, and is colored with "annatto," is adulterated.² To add formaldehyde to cream is to adulterate it.³ Powdered milk, from which seventy-five percent of the butter fat has been abstracted, is adulterated.⁴ A milk product was labeled as follows: "Country Club Brand Condensed Milk, Scio Condensed Milk Co., Scio, Oregon. The Milk of Quality, 'Country Club.' Directions. Pure High Grade Milk. Evaporated and preserved by perfect sterilization. Country Club Brand. Used for every purpose that you would use natural milk from the cow. Give the same care and attention you would fresh milk or cream. Every precaution has been taken in the handling of this milk to produce a food product, absolutely pure. This product complies with the Pure Food Law." Samples from this shipment were procured and analyzed by the Bureau of Chemistry, United States Department of Agriculture, and the product was found to contain water 7.67 percent, fat 7.20 percent, protein 7.46 percent, lactose 10.46 percent, ash 1.55 percent, undetermined 0.66 percent, the percent of total solids being 27.33, and the proportion of fat in said solids being 26.3 percent. This was held to show that the product was adulterated, and it was confiscated.⁵ Where powdered milk was decomposed and putrid near the end of the barrels, it was held that the charge of adulteration was sustained, because the product consisted in part of a decomposed and putrid animal substance.⁶

§ 178. Milk, Evaporated.

"For a considerable period of time the Dairy Division of the Bureau of Chemistry has been conducting an extended investigation in regard to the manufacture of evaporated milk (i. e., unsweetened condensed milk), and the character of the milk used by the manufacturers. This investigation

² N. J. 586; N. J. 521.

³ N. J. 513; N. J. 9.

⁴ N. J. 273; N. J. 211.

⁵ N. J. 845.

⁶ N. J. 1033. Composition. Wiley, Food Adulteration 169.

Composition of buttermilk. Wiley, Food Adulteration 181. Coloring. Leach, Food Inspection 174. Forms of adulteration. Leach, Food Inspection 159, 161.

has been carried on through the various seasons of the year and in various parts of the country, so that knowledge has been obtained of the seasonal variations in milk from herds of different types, and the different manufacturing methods in use, as well as of the character of the finished product from many sources.

"The fault of the standards, as approved by the Committee on Food Standards of the Association of Official Agricultural Chemists and the Interstate Food Commission, published as Circular No. 19 of the Office of the Secretary, lies in the low percentage of fat in the total solids, namely, 27.5 percent. This low figure the board believes has encouraged the use of a partially skimmed milk, which fact is amply borne out by the many analyses made in the department. Again, this standard of 28 percent total solids in Circular No. 19 is one not easily attained in all localities of the United States, during all seasons, by the usual methods of manufacture under ordinary working conditions, with the production of a satisfactory marketable article.

"Considering the natural variations in the richness of milk from different breeds of cows and at different times of the year, as well as the practical conditions of manufacture, the Department has decided upon the following requirements, which it considers reasonable and just, with respect to the manufacture and composition of evaporated milk (i. e., unsweetened condensed milk):

"(1) It should be prepared by evaporating the fresh, pure, whole milk of healthy cows, obtained by complete milking and excluding all milkings within fifteen days before calving and 7 days after calving, provided at the end of this 7-day period the animals are in a perfectly normal condition.

"(2) It should contain such percentages of total solids and of fat that the sum of the two shall not be less than 34.3 and the percentage of fat shall not be less than 7.8 percent. This allows a small reduction in total solids with increasing richness of the milk in fat.

"(3) It should contain no added butter or butter oil in-

corporated either with whole milk or skimmed milk or with the evaporated milk at any stage of manufacture.

"In view of the well-known tendency of factory analyses—often of necessity made rapidly and by persons not skilled as analysts—to give results above the truth with respect to fat, and especially with respect to total solids, manufacturers are advised always to allow a safe margin between their factory practice and the above-stated requirements as to percentage composition. This can be done without difficulty in all localities and at all seasons of the year."¹

§ 179. Mince-Meat.

Glucose used in mince-meat for sugar, which is one of the ancient and well-known and essential ingredients of mince-meat, is an adulterant.¹ To put 0.06 or 0.08 of one percent of salicylic acid in meat is to violate the statute.²

§ 180. Mineral Oil.

Mineral oil can not be used in food. If it is, the food is adulterated.¹

§ 181. Mineral Water.

To sell contaminated mineral water which is unfit for consumption is a violation of the statute.¹

§ 182. Molasses.

Water used in molasses¹ adulterates it,² and so to use glucose.³

¹ F. I. D. 131.

¹ N. J. 639.

² N. J. 765; N. J. 766. Adulteration, Wiley, Food Adulteration 495.

¹ N. J. 539; N. J. 59.

¹ N. J. 41; N. J. 175; N. J. 876 (vichy water).

¹ See Corn Syrup.

² N. J. 254.

³ N. J. 22; N. J. 127. Adulteration, Wiley, Food Adulteration 480; Leach, Food Inspection 621.

§ 182a. Mustard, Charlock as a Substitute for.

"It has come to the attention of the Board of Food and Drug Inspection that the seed of charlock (*Brassica arvensis* L.) is being substituted by some manufacturers, in whole or in part, for that of the true mustards, viz., yellow or white mustard (*Sinapis alba* L., synonym *Brassica alba* [L.] Boiss.), brown mustard (*B. juncea* L.), and black mustard (*B. nigra* L.).

"It is the opinion of the board that when charlock is substituted in part for mustard the label should clearly indicate this fact. A condiment prepared from mustard or mustard flour and charlock with salt, spices, and vinegar is not 'Prepared Mustard,' but, provided a greater quantity of mustard than of charlock is used, it should be called 'Prepared Mustard and Charlock.'"¹

§ 183. Oats.

A mixture of oats, wheat, barley and other seeds, sold as "white oats," is a violation of the statute.¹ Barley substituted for oats is an adulteration of the oats.² So if it contains weed seed.³

§ 184. Olives.

A sale of filthy, putrid and decaying olives is a violation of the statute.¹ Olives of which 30.2 percent contains worms and pupae, 35.2 percent are worm-eaten, and 6.7 percent are partly decayed, may not be sold.² Worm-eaten and decayed olives are adulterated.³

¹ F. I. D. 137..

¹ N. J. 650; N. J. 582; N. J. 409; N. J. 650; N. J. 759.

² N. J. 406; N. J. 385; N. J. 381; N. J. 379; N. J. 378; N. J. 58; N. J. 76; N. J. 101; N. J. 748; N. J. 749; N. J. 752.

³ N. J. 748; N. J. 749; N. J.

752. Analysis. Leach, Food Inspection 271.

¹ N. J. 649; N. J. 648; N. J. 647; N. J. 578; N. J. 577; N. J. 869.

² N. J. 560.

³ N. J. 817; N. J. 818. Composition, Wiley, Food Adulteration 234; Leach, Food Inspection 511.

§ 185. Olive Oil.

Mixing cotton-seed oil with olive oil is an adulteration of the latter oil.¹

§ 186. Oysters—Shellfish.

To sell oysters containing so large an amount of bacteria as to be unfit for food is an offense.¹ In the case of "shucked" oysters, to mix water with them so as to reduce, lower and injuriously affect their quality and strength, and also to substitute water for part of their bulk, is to violate the statute.² Upon this question the following decisions have been rendered by the Agricultural Department:

"The Department has investigated the preparation and shipment of oysters, clams, and other shellfish. A public hearing on this subject was held by the Board of Food and Drug Inspection on May 20, 1909. At this hearing growers, packers, dealers and the public were afforded an opportunity to be heard.

"It is unlawful to ship or to sell in interstate commerce oysters or other shellfish taken from insanitary or polluted beds. The pollution of oysters with sewage can readily be detected by bacteriological examination, and such polluted oysters or other shellfish are adulterated under section 7 of the Food and Drugs Act of June 30, 1906, in that they contain an added 'poisonous or other added deleterious ingredient which may render such article injurious to health.'

"Such articles are likewise adulterated under section 7, in the case of foods, because they consist 'in whole or in part of a filthy, decomposed or putrid animal or vegetable substance.'

"It is unlawful to ship or to sell in interstate commerce oysters or other shellfish which have become polluted because of packing under unsanitary conditions or being placed

¹ N. J. 617; N. J. 574; N. J. 535; Adulteration, Wiley, Food Adul-
N. J. 489; N. J. 453; N. J. 417; teration 402; Leach, Food Inspec-
N. J. 386; N. J. 340; N. J. 247; tion 512, 515.
N. J. 244; N. J. 133; N. J. 997; ¹ N. J. 475; N. J. 448; N. J. 447.
N. J. 953; N. J. 915; N. J. 916. ² N. J. 789.

in unclean receptacles. In order to prevent pollution during the packing or shipment of oysters, it is necessary to give proper attention to the sanitary condition of the establishment in which they are packed and to use only receptacles which have been thoroughly cleansed as soon as emptied. In order to prevent the possibility of contamination, it is desirable that such containers be sterilized before using.

"It is unlawful to ship or to sell in interstate commerce oysters or other shellfish which have been subjected to 'floating' or 'drinking' in brackish water, or water containing less salt than that in which they are grown. Such food is adulterated under section 7 of the law because a substance 'has been mixed and packed with it so as to reduce or lower or injuriously affect its quality or strength.' There can be no objection to 'drinking' shellfish in unpolluted water of the same salt content as that from which they have been removed. Attention is called, however, to the dangers resulting from 'drinking' shellfish near polluted fresh-water streams and near other sources of pollution.

"It is unlawful to ship or to sell in interstate commerce shucked oysters to which water has been added, either directly or in the form of melted ice. Such food is adulterated under section 7 of the Act because a 'substance has been mixed and packed with it so as to reduce or lower or injuriously affect its quality or strength,' and also because a 'substance has been substituted wholly or in part for the article.'

"The packing of shellfish with ice in contact may lead to the absorption by the oyster of a portion of the water formed by the melting ice, thus leading to the adulteration of the oysters with water.

"Only unpolluted cold or iced water should be employed in washing shucked shellfish, and the washing, including chilling, should not continue longer than the minimum time necessary for cleaning and chilling.

"In view of the fact that the shipping season has begun and shippers will require several months to provide themselves with suitable containers for the shipment of shellfish out of contact with ice, no prosecutions will be recommended

prior to May 1, 1910, for the shipment or sale in interstate commerce of oysters or other shellfish because of the addition of water caused solely by shipment in contact with ice.”³

This decision was amended by the following one:

“Considerable evidence has been submitted to the Department since the issuance of Food Inspection Decision 110 on the practice of floating or drinking oysters in water of less saline content than that in which they were grown to maturity.

“Full consideration has been given to all the hearings and to the briefs and other information submitted subsequent to the hearings, and the board is of the opinion that it is not improper to drink oysters in water of a saline content equal to that in which oysters will grow to maturity. If, however, oysters are floated in water of a less saline content than that in which oysters will properly mature, the packages containing such oysters must be very clearly and legibly labeled ‘Floated Oysters,’ otherwise they will be considered adulterated under section 7 of the law.

“Particular attention should be paid by the growers and handlers of oysters to the character of the water in which the oysters are brought to maturity or floated. Where such waters are polluted it will invariably follow that the oysters will also partake of this pollution and subsequent washing of the oysters, or even floating in water which is not polluted is likely not to cleanse them of this pollution.

“Oysters found in interstate commerce in a polluted condition because of the character of the water in which they are grown or floated are adulterated under the Food and Drugs Act.”⁴

§ 186a. Peaches.

Evaporated peaches that are filthy, containing worms, beetles, worm excreta, sugar mites, yeast, and worm-eaten peaches, are adulterated.¹

³F. I. D. 110.

⁴F. I. D. 121. Average composi-

tion, Wiley. Food Adulteration 164; Leach, Food Inspection 257.

¹N. J. 946.

§ 187. Peach Butter.

To substitute in part, in peach butter, glucose, is an adulteration of the butter.¹

§ 188. Peach Extract.

To sell an imitation of peach extract for peach extract is a violation of the statute.¹

§ 189. Peanuts.

Peanuts in a filthy condition, and infected with worms and other animal matter, and so contaminated with the presence of such worms and other animal matter as to be absolutely unfit for human consumption, can not be kept for sale.¹

§ 190. Pepper.

Sand and ash used in pepper adulterate it.¹ A wheat product, capsicum and fruit shells used in black pepper, adulterate it.² Ground fruit stones and pepper shells put into pepper adulterate it.³ Leguminous seed substituted in part for pepper is an adulteration of the latter.⁴ So where 35 percent in the product was ground cereal it was held that the pepper was adulterated.⁵ A product labeled "pepper" containing ash 6.68 percent, ash insoluble in hydrochloric acid 1.10 percent, and crude fibre 22.42 percent, is adulterated, the percentage of ash insoluble in hydrochloric acid representing the amount of sand present in it.⁶

§ 191. Phosphate, Apple.

A substance labeled "Apple Phosphate" showed the following results on analysis: Alcohol by volume 7.41 percent,

¹ N. J. 592.

² N. J. 288; N. J. 159.

³ N. J. 520.

³ N. J. 210; N. J. 75; N. J. 122.

⁴ N. J. 368; N. J. 253; N. J. 944; N. J. 945. Composition, Wiley, Food Adulteration 420.

⁴ N. J. 158.

⁵ N. J. 835.

⁶ N. J. 1013. Adulteration, Leach, Food Inspection 435.

¹ N. J. 297; N. J. 28.

solids 3.22 percent, reducing sugars (after inversion) 1.70 percent, direct polarization $+4.4^{\circ}$, invert polarization $+4.4^{\circ}$, ash 0.125, alk. of sol. ash 10.9 cc, alk. insol. ash 4.0 cc, insol. ash 0.025, soluble ash by difference 0.00, P_2O_5 in sol. ash 3.3 mg, P_2O_5 in insol. ash 5.2 mg, total acidity (as malic) 0.412, volatile acid 0.022, fixed acids 0.362, reducing sugars direct 1.64. The product was condemned by the court.¹

§ 192. Phosphoric Acid.

Preserves in which phosphoric acid is used in 0.16 percent are adulterated.¹ So where 0.24 percent is used.²

§ 193. Pineapple Extract.

Coloring matter added to pineapple extract so as to conceal its inferiority is in violation of the statute.¹

§ 194. Poison.

Any poison used in food is a violation of the statute. The courts will not indulge "in hairsplitting speculation as to whether the amount of poison used may possibly have been so nicely calculated as not to kill or be of immediate serious injury."¹ Such is formaldehyde in cream or milk or other food.²

§ 195. Prunes.

Prunes of which 75 percent are infested with worms crawling in the crevices, and the remainder containing both excreta and sugar mites are adulterated.¹

§ 196. Raisins.

To adulterate raisins so that they consist in part of a

¹ N. J. 796.

¹ N. J. 703 (preserves).

² N. J. 702 (apple butter). In beer, Leach, Food Inspection 725; in baking chemicals, Leach, Food Inspection 346.

¹ N. J. 152. Adulteration, Wiley, Food Adulteration 361. Imitation. Leach, Food Inspection 884, 885.

¹ N. J. 658.

² N. J. 513.

¹ N. J. 833; N. J. 948.

filthy and decomposed vegetable substance is an offense under the Food and Drugs Act.¹

§ 197. Rice.

Rice coated with glucose and talc is in violation of the statute if its inferiority is thereby concealed.¹ In this instance the Secretary of Agriculture has said:

"It has been represented to the department that it is a very common practice in this country in the preparation of rice for commerce to treat it in the following manner:

'1. The rough rice is passed through a set of stones, or shellers, which removes the hull.

'2. The product is subjected to a series of scouring machines by which the bran and cuticle are removed.

'3. The rice is passed through a machine that is known as the brush, which removes a portion of the flour, or more commonly known as polish.

'4. The rice is introduced into a warm revolving drum or cylinder holding often as much as 4,000 pounds, and glucose and talc are added in the following manner and in about the following proportion: As the rice is fed into the drums a small proportion of glucose and talc are applied, namely, glucose one one-thousandth and talc one three-thousandth part of the whole. The object of the glucose is to form a coating by means of which a part of the talc is held on the surface of the rice.'

"It is stated that the rice is coated for the following reasons:

'1. The coating makes the rice less susceptible to dust and other foreign matter during transportation and storage.

'2. It is, in a measure, a preventive against the attack of the weevils and worms which are so destructive in warm climates.'

"It has also been represented that in some instances paraffin is used instead of glucose and that rice starch is sometimes used in place of talc for the purpose of finishing rice according to the method described above.

"In submitting these representations it has been asked if the process above described is permitted under the Food and Drugs Act of June 30, 1906. It is not clear to the de-

¹ N. J. 596; N. J. 531; N. J. 145; N. J. 146; N. J. 162. ¹ F. I. D. 67; N. J. 1030.

partment that coating rice in this way protects it in any manner from dust. Evidence of an expert character is also on file in the department showing that unpolished rice is no more subject to the ravages of the weevil than the polished article.

"It is the opinion of the department that no coating of any kind can be used in the manner indicated if the product "be mixed, colored, powdered, coated, or stained in a manner whereby damage or inferiority is concealed." In each case whether or not such a result be secured is a question of fact to be decided by the evidence.

"It is held by the department that rice treated in the manner indicated above with glucose and starch should be labeled in all cases with the name of the extraneous substances, as 'Coated with Glucose and Starch.'

"In such declarations all of the food substances used for coating should be mentioned. Any coloring matter or other substances that may be employed to change the tint of the rice should be declared on the label.

"The question of the wholesomeness of paraffin, talc, or other nonfood substances used is to be construed in such a way as to protect the health of those most susceptible to their influences. Rice is a diet often prescribed for those suffering from impaired digestion. The use of paraffin in such cases is at least of questionable propriety, and in the opinion of the department it should be excluded from food products. Under the fifth provision of foods, section 7 of the Food and Drugs Act, June 30, 1906, and under regulation 14 the use of talc is permitted, provided that each package is plainly labeled with the name of this preservative and the proper directions for removal be given."¹

§ 198. Rococola.

To sell rococola, a soft drink containing caffeine and cocaine, is forbidden by the statute.¹

¹ Composition, Leach, Food Inspection 272.

¹ N. J. 466.

§ 199. Saccharin in Food.

“At the request of the Secretary of Agriculture, the Referee Board of Consulting Scientific Experts has conducted an investigation as to the effect on health of the use of saccharin. The investigation has been concluded, and the Referee Board reports that the continued use of saccharin for a long time in quantities over three-tenths of a gram per day is liable to impair digestion; and that the addition of saccharin as a substitute for cane sugar or other forms of sugar reduces the food value of the sweetened product and hence lowers its quality.

“Saccharin has been used as a substitute for sugar in over thirty classes of foods in which sugar is commonly recognized as a normal and valuable ingredient. If the use of saccharin be continued it is evident that amounts of saccharin may readily be consumed which will, through continual use, produce digestive disturbances. In every food in which saccharin is used, some other sweetening agent known to be harmless to health can be substituted, and there is not even a pretense that saccharin is a necessity in the manufacture of food products. Under the Food and Drugs Act articles of food are adulterated if they contain added poisonous or other added deleterious ingredients which may render them injurious to health. Articles of food are also adulterated within the meaning of the Act, if substances have been mixed and packed with the foods so as to reduce or lower or injuriously affect their quality or strength. The findings of the Referee Board show that saccharin in food is such an added poisonous or other added deleterious ingredient as is contemplated by the Act, and also that the substitution of saccharin for sugar in foods reduces and lowers their quality.

“The Secretary of Agriculture, therefore, will regard as adulterated under the Food and Drugs Act foods containing saccharin which, on and after July 1, 1911, are manufactured or offered for sale in the District of Columbia or the Territories, or shipped in interstate or foreign commerce, or offered for importation into the United States.¹

¹ F. I. D. 135. Subsequently the date was extended to January 1, 1912. F. I. D. 138. See also Bulletin No. 19 of South Dakota. Detection, Leach, Food Inspection 843, 844.

§ 200. Sago and Tapioca.

"It has come to the attention of the Board of Food and Drug Inspection that there exists among the trade in various parts of the United States a very general misunderstanding with respect to sago and small pearl tapioca. Sago is prepared from the starch obtained from the pith found in the stem of several species of palm trees, natives of the East Indies, and tapioca is prepared by heating in a moist state the starch made from the root of the cassava or tapioca plant, which is indigenous to certain South American countries. Both products ordinarily reach the consumer in granulated form and are designated as 'pearl sago' and 'pearl tapioca,' respectively. While 'pearl sago' and 'pearl tapioca' are separate and distinct articles of commerce, each resembles the other closely in appearance, and fine pearl tapioca frequently has been labeled and sold as sago.

"Under the Food and Drugs Act of June 30, 1906, articles of food are misbranded if the labels or packages contain statements which are false and misleading, or if particular articles are imitations of or offered for sale under the distinctive names of other articles. In the opinion of the Board the name 'sago,' or 'pearl sago,' without qualifications, means the product obtained from the pith of East Indian palm trees, and starch products of different origin will be held to be misbranded under the Act if labeled or offered for sale as 'sago,' 'pearl sago,' etc. The prepared starch product derived from the root of the cassava plant is tapioca, and should be sold and labeled as such.

There is also on the market an imitation sago made from potato starch. Imitation food products are misbranded under the Act unless they are labeled so as to indicate plainly that they are imitation products and unless the word 'imitation' is also plainly stated on the packages in which imitation products are offered for sale. Potato or other starch prepared to resemble pearl sago, therefore, should be labeled, for example, 'Imitation sago. Made from potato starch,' the words 'Imitation' and 'Made from potato starch' being declared as plainly and conspicuously as the word 'sago.'

The word 'imitation' must appear on the label, but an equivalent expression may be substituted for 'Made from potato starch,' which will indicate unmistakably that the product is not made from the pith of East Indian palm trees, but is derived from a different source."¹

§ 201. Salts of Tin.

"The attention of the board has been directed to canned goods which contain salts of tin derived from the solvent action of the contents of the package upon the tin coating. Pending further investigations on this question all canned goods which are prepared prior to January 1, 1911, will be permitted to enter and pass into interstate commerce without detention or restriction in so far as their content of tin salts is concerned. All foods which are canned subsequently to January 1, 1911, will be permitted importation and interstate commerce if they do not contain more than 300 milligrams of tin per kilogram, or salts of tin equivalent thereto. When an amount of tin, or an equivalent amount of salts of tin, is greater than 300 milligrams per kilogram, entry of such canned goods packed subsequently to January 1, 1911, will be refused, and if found in interstate commerce proper action will be taken.

"It is the opinion of the board that the trade will experience little hardship in adjusting itself to this condition, as the results of examinations made by the Bureau of Chemistry of various types of canned goods indicate that in a very large majority of cases inconsiderable quantities of tin are found, well within the limit herein set."¹

§ 202. Shellac and Other Gums for Coating Chocolates and Other Confections.

"The Board of Food and Drug Inspection has carefully considered the evidence respecting the practice of coating chocolates and other confections with shellac and other gums. The board is of the opinion that it is not a proper proceed-

¹ F. I. D. 128. Wiley, Food Adulteration 320; Leach, Food Inspection 283.

¹ N. J. 126.

ing under the provisions of the Food and Drugs Act. It is evident that such coating will not only conceal inferiority, but it appears further that as a rule the gums are dissolved in alcohol. One man in giving evidence before the board stated that in his opinion there was no objection to wood alcohol as a solvent. In dipping confections into an alcoholic solution of a gum a certain quantity of alcohol must necessarily permeate the product. Evidence is adduced showing that the product is not submitted to any subsequent process of heating whereby the traces of alcohol could be removed. Although only mere traces of alcohol may remain, the addition of these substances, and especially of wood alcohol, to a confection is specifically prohibited by the Act. Evidence is also in the possession of the board to show that a large number of the manufacturers either never have employed this method or have discontinued it, and that goods can be, and are, made and sold in all quantities with no difficulty without the use of shellac or other gums. Evidence further shows that one of the reasons for adding the coating is that the goods may be held for a longer time. The exposure of confections for a long while before use is not advisable nor desirable."¹

§ 202a. Soda Water Syrup Cola.

A product called "Soda Water Syrup Cola" contained, among other ingredients, coca leaf alkaloids, including cocaine and a minute quantity of caffeine. It was held to be adulterated.¹

§ 203. Stock Feed.

A stock food having for its basis oats, but which contains 15 percent more of oat hulls than should be normally and 5 percent of weed seeds, is adulterated.¹ Weed seeds and chaff mixed with stock food are adulterants.²

¹ F. I. D. 119.

¹ N. J. 1031.

¹ N. J. 533; N. J. 477 (rice hulls and alfalfa); N. J. 468 (oat hulls); N. J. 256 (rice hulls); N. J. 230.

² N. J. 432; N. J. 231 (rice hulls mixed with bran); N. J. 171; N. J.

174. Musty, decomposed and moldy alfalfa hay has been seized. N. J. 902.

§ 204. Sugar in Canned Fruits and Vegetables.

Sugar used in canned fruits and vegetables so as to conceal their inferiority is a violation of the statute.¹ In this decision the Secretary of Agriculture has said:

"Numerous inquiries have been addressed to the department respecting the proper labeling of canned fruits and vegetables to which sugar has been added. Sugar is a wholesome food product, and is also condimental. It reveals its own presence by its taste. Its addition to a food product can not be objected to on the ground of injury to health.

"It is held by this department that sugar can be used in the preparation of all food products where it is not used for fraudulent purposes. If sugar be added without notice to Indian corn which is not sweet, for the purpose of making it appear a sweet corn, to be sold as such, it is used for a fraudulent purpose, and for this reason is prohibited by the law.

"In section 7 of the law it is provided that a food is adulterated 'if it be mixed, colored, powdered, coated, or stained in a manner whereby damage or inferiority is concealed.' It is evident, therefore, that a food product can not be mixed with any other substance for the purpose of concealing damage or inferiority. A vegetable which is not naturally sweet could not be sold as one which is naturally sweet by mixing with sugar without violation of the law, unless the addition of sugar is plainly indicated on the label.

"The addition of sugar to canned vegetables is not for preservative purposes. Added sugar increases the tendency to fermentation. It is added wholly as a condimental ingredient.

"It is held, therefore, that the addition of sugar to a substance not naturally sweet, converting it into a substance which might seem naturally sweet, is justified if the label plainly indicates that this sweetening material is added. In other cases, where no deception is practiced, the mention of the presence of sugar is not required.

¹ F. I. D. 66.

"The term 'sugar,' as used herein, is confined to sucrose (saccharose), either in a solid form or in solution."

§ 205. Tea.

Tea that is filthy, extremely musty and moldy is adulterated.¹

§ 206. Tomato Catsup, Paste and Pulp.

An examination of tomato catsup showed the product contained 180,000,000 bacteria per cubic centimeter, 107 yeast spores per one-sixtieth cubic millimeter, and mold filaments in 75 percent of the microscopic fields examined. The entire product was confiscated and destroyed.¹ The product was also artificially colored so as to conceal its inferiority.² The same ruling was made with reference to tomato paste,³ tomato pulp⁴ and "Brace Up Tomato Tonic."⁵

§ 206a. Turmeric.

A food called turmeric which contains wheat starch or wheat flour and 10.74 percent calcium sulphate is adulterated, the calcium sulphate being substituted in part for the article turmeric.¹

§ 207. Vanilla and Caramel.

Vanillin and caramel used in vanilla is an adulterant.¹ To

¹ N. J. 829. Adulteration. Leach, Food Inspection 374.

² N. J. 760; N. J. 761; N. J. 762; N. J. 763; N. J. 732; N. J. 781; N. J. 838; N. J. 827; N. J. 821; N. J. 805; N. J. 887; N. J. 875; N. J. 904; N. J. 921; N. J. 922; N. J. 925; N. J. 937; N. J. 943; N. J. 947; N. J. 950.

³ See also N. J. 79; N. J. 111; N. J. 156; N. J. 388; N. J. 474; N. J. 599; N. J. 604; N. J. 622; N. J. 670; N. J. 732; N. J. 992; N. J.

1003; N. J. 1004; N. J. 1006; N. J. N. J. 1034.

⁴ N. J. 762; N. J. 767; N. J. 801; N. J. 803; N. J. 1001; N. J. 1008; N. J. 893; N. J. 894; N. J. 973 N. J. 984.

⁵ N. J. 717; N. J. 744; N. J. 800; N. J. 900.

⁶ N. J. 999. Preservatives in, Leach, Food Inspection 907, 908.

⁷ N. J. 996. Leach, Food Inspection 452.

⁸ N. J. 663; N. J. 659 (vanillin

color a dilute extract of vanilla so as to conceal its inferiority is an offense.² A court can not say that "vanilla extract" and "vanilla flavor," as known to the trade, is one and the same thing; and that "extract" and "flavor" are synonymous in meaning.³ The substitution of synthetic vanillin for the extract of vanilla bean is an adulteration.⁴

§ 207a. Vani-Kola.

A liquid labeled "Vani-Kola Compound Syrup," which contained caffein and coca leaf alkaloids, including cocaine, has been condemned.¹

§ 208. Vinegar.

A mixture of distilled vinegar and a product high in reducing sugars used in alleged cider vinegar is an adulterant.¹ Dilute acetic acid mixed with a product high in reducing sugars used in alleged cider vinegar is an adulterant.² Mixing water with vinegar so as to render the latter deficient in acid strength is an adulteration.³ The following analysis shows the vinegar analyzed as adulterated:

"Solids	1.91
Reducing sugar invert.....	1.16
Per cent sugar in solids.....	60.8
Polarization, direct, temp. °C. 26 and 20.....	—2.6
Polarization, invert, temp. °C. 26.....	—2.6

alone); N. J. 662; N. J. 532; N. 653; N. J. 645; N. J. 642; N. J. J. 389; N. J. 242; N. J. 123; N. J. 626; N. J. 621; N. J. 584; N. J. 148; N. J. 151; N. J. 842; N. J. 570; N. J. 399; N. J. 398; N. J. 740; N. J. 889; N. J. 932; N. J. 394; N. J. 318; N. J. 304; N. J. 983. 289; N. J. 286; N. J. 278; N. J.

² N. J. 320.

³ N. J. 301.

⁴ N. J. 48; N. J. 135; N. J. 139; 193; N. J. 195; N. J. 197; N. J. N. J. 1029. Adulteration. Leach, 199; N. J. 1007; N. J. 1023; N. J. Food Inspection 853. 917; N. J. 844; N. J. 867; N. J.

¹ N. J. 935.

977; N. J. 985.

¹ N. J. 690; N. J. 681.

² N. J. 616; N. J. 597.

² N. J. 679; N. J. 678; N. J.

Ash	0.26
Alk. sol. ash (cc N/10 acid per 100 cc)	29.1
Sol. phos. acid (mgs. per 100 cc)	1.5
Insol. phos. acid, (mgs. per 100 cc)	11.1
Acid, as acetic (wines tartaric)	4.64
Volatile acid, as acetic	4.64
Fixed acid, as malic (wines, tartaric)	0.0
Lead precipitate	Small.
Color, degrees, brewer's scale 0.5 in.	4.0
Color removed by fuller's earth (percent)	65.0
Ash in solids (percent)	13.9
Salicylates and benzoates	Negative.
P_2O_5 water sol.	
Ratio $\frac{P_2O_5 \text{ water sol.}}{P_2O_5 \text{ water sol.}}$ (percent)	11.9

Vinegar, cider vinegar, apple vinegar, as recognized by reliable manufacturers and dealers, is the product made by the alcoholic and subsequent acetous fermentations of the juice of apples. The analysis of the aforesaid sample disclosed that it contained dilute acetic acid, or distilled vinegar, and a foreign material high in reducing sugars. Hence the article was adulterated within the meaning of section 7 of the act in that a mixture of dilute acetic acid, or distilled vinegar, and a foreign material high in reducing sugars had been substituted wholly or in part for the vinegar which it purported to be, and was misbranded within the meaning of section 8 of the Act in that it was labeled 'Apple Cider Vinegar,' which statement was false, misleading, and deceptive because it was not an apple cider vinegar, but a mixture of dilute acetic acid, or distilled vinegar, and a foreign substance high in reducing sugars."⁴

§ 209. Waffles.

A product was labeled "Non plus ultra I. J. S. Waffles." An analysis showed that it contained boric acid or its salts; and it was held that it was adulterated.¹

⁴N. J. 189; N. J. 815; N. J.

¹N. J. 808.

844. Adulteration. Leach, Food Inspection 770, 776.

§ 210. Whisky.

To use coloring matter in whisky so as to conceal its inferiority is a violation of the statute.¹ The following analysis of whisky shows that it is unlawfully colored:

Proof	85.8
Grains per 100 liters of 100 proof alcohol:	
Total solids	291.9
Acids	9.8
Esters	12.1
Aldehydes	1.6
Furfurol	None.
Fusel oil	16.0
Total color (degrees, brewer's scale).....	19.8
Color insoluble in water (percent).....	0.0
Color soluble in ether (percent).....	0.0
Color insoluble in amyl alcohol (percent).....	73.0

Such whisky can not be sold or offered for sale without a violation of the statute.²

§ 211. Wine.

To use artificial coloring matter in wine is to adulterate it;¹ so to use glucose and benzoate of soda.²

¹ F. I. D. 45.

¹ N. J. 737.

² F. I. D. 15. Adulteration,
Leach, Food Inspection 738.

² N. J. 824. Adulteration, Leach,
Food Inspection 691.

CHAPTER V.

ADULTERATION OF DRUGS.

ART. I. ADULTERATION.

ART. II. SPECIFIC ARTICLES.

ART. I.—ADULTERATION.

SEC.

212. What drugs deemed adulterated.

213. Standard for drugs.

SEC.

214. United States Pharmacopoeia and National Formulary.

§ 212. What Drugs Deemed Adulterated.

Section seven of the Food and Drugs Act provides "That for the purposes of this Act an article shall be deemed to be adulterated:

"In case of drugs:

"First. If when a drug is sold under or by a name recognized in the United States Pharmacopoeia or National Formulary, it differs from the standard of strength, quality or purity, as determined by the test laid down in the United States Pharmacopoeia or National Formulary official at the time of investigation: Provided, That no drug defined in the United States Pharmacopoeia or National Formulary shall be deemed to be adulterated under this provision if the standard of strength, quality or purity be plainly stated upon the bottle, box, or other container thereof although the standard may differ from that determined by the test laid down in the United States Pharmacopoeia or National Formulary.

"Second. If its strength or purity fall below the professed standard or quality under which it is sold."

This section fixes what is and what is not an adulterated

PURE FOOD—18.

drug. We are not required to look elsewhere for a definition. If the drug stands the test laid down in either the United States Pharmacopoeia or National Formulary, official at the time of the investigation, then it is not adulterated; if it falls below that test, then it is adulterated, although according to some other test it is not. A sale of a drug that is not up to the test of either of these two authorities subjects the seller to the penalty prescribed by the statute for a sale of an adulterated drug.¹ But the Pharmacopoeia or Formulary must state clearly the composition of the article; and if it merely gives a receipt how the article in question may be made, then it does not prescribe a test.² It can not be shown that there is a commercial standard for the drug, as a defense, other than that of one or the other of these two authorities.³ If the article sold has no recognized standard of purity in these two authorities, then no offense is committed by selling an article of low quality but genuine.⁴ Thus where marmalade was sold which contained 13 percent of glucose instead of cane or beet sugar; and there was evidence that for many years glucose had been used by some marmalade manufacturers, but not all, and that its use had a tendency to prevent mildew; and the Pharmacopoeia then in use did not prescribe the qualities of marmalade, it was held there could be no conviction of a sale of an adulterated article.⁵ But if a drug be defined by these two authorities, yet one of an inferior quality may be sold "if the standard of strength, quality or purity be plainly stated upon the bottle, box or other container thereof." The legend on the

¹ *White v. Bywater*, 19 Q. B. Div. 582, 51 J. P. 821, 36 W. R. 280.

² *Hudson v. Bridge*, 67 J. P. 186, 19 T. L. R. 369.

³ *Dickins v. Randerson* [1901], 1 K. B. 437, 65 J. P. 262, 70 L. J. K. B. 344, 84 L. T. 204, 19 Cox C. C. 643. But see *Boots' Cash Chemists v. Cowling*, 67 J. P. 195, 19 T. L. R. 370.

⁴ *Hoyle v. Hitchman*, 4 Q. B. Div. 233, 43 J. P. 431, 48 L. J. M. C. 97, 40 L. T. 252, 27 W. R. 487; *Davidson v. McLeod*, 42 J. P. 43, 5 *Rettie* (J. C.) 1, 3 Coup. 511; *Morton v. Green*, 8 *Rettie* (J. C.) 36, 4 Coup. 437.

⁵ *Smith v. Wisden*, 66 J. P. 150, 85 L. T. 760.

label must be a plain one and truthful. But if the strength or purity of the drug fall below the professed standard or quality under which it is sold, then there is a sale of an adulterated drug. The first paragraph of the section above quoted relates to substances and mixtures of substances sold under or by a name recognized by the United States Pharmacopoeia or National Formulary; and the second relates to drugs generally whether named in these two authorities or not, and includes the so-called "patent" or proprietary medicines. Under this second paragraph the drug or medicine must be in strength and purity up to the professed standard or quality under which it is sold.⁶ Within the States the requirements of this section do not apply to prescriptions there compounded in which they are sold; but it does apply to prescriptions which are shipped out of the State and to drugs in original unbroken packages. If the patentee himself, or member of his household, or the physician himself, carries the package across a State line, and such package is not subject to sale, the package or prescription need not be labeled so as to conform with the law, because the transaction is not one of interstate commerce.⁷ In the District of Columbia and in the Territories the requirements of this section apply not only to drugs in the original unbroken packages, but also to prescriptions there compounded.

§ 213. Standard for Drugs.

The regulations provide as follows: "(a) A drug bearing a name recognized in the United States Pharmacopoeia or National Formulary, without any further statement respecting its character, shall be required to conform in strength, quality and purity to the standards prescribed or indicated for a drug of the same name recognized in the United States Pharmacopoeia or National Formulary, official at the time."¹

⁶ Under this clause a sale is necessary to constitute the offense.

⁷ F. I. D. 57.

¹ Regulation 7.

"If the Pharmacopoeia or Na-

tional Formulary says something is a drug, it is a drug under the meaning of the Act. Or if it comes under the other description [as defined by Section 6 of the Food and

**§ 214. United States Pharmacopoeia and National
Formulary.**

These are the two recognized authorities in this country on the standard of drugs. Editions from time to time of these works are issued; and it is to be observed that regulation seven requires the drug to be up to the standard prescribed by one or the other of these two works by the edition "official at the time" the drug is sold or offered for sale. If the drug at the time of the sale is then up to the standard prescribed by one of these authorities a subsequent edition requiring a higher standard can not turn what was an innocent act at the time of the sale into a criminal one. Of the National Formulary the Department of Agriculture has had this to say: "The National Formulary is one of the standards recognized under the law. The question has been asked a number of times whether the appendix of this authority would be construed as part and parcel of the book itself. On page IV of the preface it is distinctly stated that the formulae collected in the appendix of the National Formulary are 'no longer designated as "N. F." preparations.' This shows that these formulae are not integral parts of the book under the law, which covers only those products of the National Formulary recognized as such by this authority. By this it is understood that if a drug product is sold under a name contained in the appendix of the National Formulary, it will not be necessary for such product either to conform to the standard indicated by the formula or to declare upon the label its own standard strength, quality, and purity if a different formula is employed in its manufacture. Such articles are, however, subject to the law in every other respect, as is the case of other medicinal products not recognized by the U. S. Pharmacopoeia or National Formulary."¹

Drugs Act of 1906] of what a drug is, it is a drug, and so food also is described. There are no standards fixed in either case, for, if any substance or mixture is intended to be used for the cure, mitigation or prevention of disease of either man

or other animals, it is nevertheless a drug whether it is recognized in the Pharmacopoeia or National Formulary or not." Judge Hollister, N. J. 823.

¹ F. I. D. 59.

Of course, the courts can not take judicial knowledge of the contents of those two standards; and it is not sufficient in a libel or indictment to aver generally that the drug drawn in question was below the standard prescribed by these two authorities. It should be averred what is the test these authorities require, and then an averment added that the article sold or offered for sale was below, stating in what particular, the test thus prescribed.²

ART. II.—SPECIFIC ARTICLES.

SEC.

- 215. Assafoetida.
- 216. Belladonna root.
- 217. Blackberry cordial.
- 218. Camphor.
- 219. Cloves—Amboyna, powders.
- 220. Colocynth.
- 221. Gentian root, powdered.
- 222. Gum tragacanth.
- 223. Henbane, powdered.

SEC.

- 223a. Kamola.
- 224. Laudanum.
- 225. Peroxide of Hydrogen.
- 225a. Senna, ground Alex.
- 226. Soemnoform.
- 226a. Sodic Aluminic Sulphate.
- 226b. Tragacanth.
- 226c. Turpentine.

² "There are no standards of quality laid down in the [British] Acts for drugs, and they contain no provision making the British Pharmacopoeia a standard for such drugs or medicines as are specified herein.

"The British Pharmacopoeia, which is somewhat restricted in its scope, and is essentially intended to establish a uniform standard of strength and composition of drugs for the use of the medical profession in prescribing for their patients, could not be expected to include and govern the great variety of medical preparations which are prepared and sold under various names for domestic use. When, however, any British Pharmacopoeia medicine is asked for, especially in the exact terms of the de-

scription given of the same in the Pharmacopoeia, it is usually necessary that the person should be supplied with the article prepared according to the formula given therein. Thus, if a person who asked for 'sweet spirits of nitre,' was supplied with an article not of the standard of the British Pharmacopoeia (cf. *White v. Bywater*, 19 Q. B. Div. 582, 51 J. P. 821, 36 W. R. 280) he might fairly consider himself as prejudiced by the transaction. But this is not the case when the British Pharmacopoeia states exactly what the constituent parts of the article should be. (See *Hudson v. Bridge*, 67 J. P. 186, 19 T. L. R. 369.). And it is possible that in some cases there may be a commercial standard for the article, differing

§ 215. Assafoetida.

Assafoetida that does not contain at least 50 percent alcohol, soluble material, and not more than 15 percent ash, is adulterated.¹

§ 216. Belladonna Root.

A drug product was labeled "Belladonna Root, powdered Atropia." This belladonna differed from the standard of strength and purity, as determined by the tests laid down in the United States Pharmacopoeia, official at the time of the investigation, in that it contained ground olive pits; and it was adjudged adulterated.¹

§ 217. Blackberry Cordial.

Blackberry cordial consisting wholly or in part of the fermented solution of starch sugar, artificially colored or flavored, does not comply with the blackberry cordial recognized by the National Formulary, the ingredients of which are "freshly pressed blackberry juice, sugar and dilute alcohol with cinnamon, cloves and nutmegs;" and it is an adulterated product.¹

§ 218. Camphor.

Spirits of camphor below the grade recognized by the United States Pharmacopoeia may not be sold.¹

§ 219. Cloves—Amboyna, Powdered.

A product was labeled "Powdered Cloves—Amboyna." It differed from the standard of strength, quality and purity as determined by the tests laid down in the United States Pharmacopoeia, official at the time of the investigation, be-

from that of the Pharmacopoeia.

¹ N. J. 157.

(See *Boots v. Cowling*, 67 J. P.

¹ N. J. 754.

195, 19 T. L. R. 370.)" Bell's Sale

¹ N. J. 612; N. J. 926.

of Food and Drugs Act (5th Ed.)

¹ N. J. 550; N. J. 221.

250.

cause it contained from one-third to one-half clove stalks. It was adjudged that the article was adulterated, the court saying:

"I understand the defendant's statement to amount to this: That the cloves in question were made from 'a good commercial article of cloves as purchased by us in the New York market and ground by us for the trade.' Admittedly some stems are found even in medical preparations of cloves. The accusation here is that there was too much stem as evidenced by the stone cells found in the powdered medicament. The government chemist asserts that the government by its regulations permits the presence in cloves of '5 percent of the stalks,' which percentage is greatly exceeded in the specimen submitted. It appears to me that the presence of a substantially greater percentage than 5 percent of the ground stalk in the article sold was discoverable and should have been discovered. I do not think that it is an excuse to say that a good commercial article was bought, ground and sold for medicine."¹

§ 220. Colocynth.

To offer for sale powdered colocynth from which the seeds had not been removed and consisting of a mixture of the pulp and seeds of colocynth apple, is an offense.¹

§ 221. Gentian Root, Powdered.

A product was labeled "Powdered Gentian Root." It differed from the standard of strength, quality and purity as determined by the tests laid down in the United States Pharmacopoeia official at the time of the investigation, because it contained an unknown ground fiber which does not belong to gentian, not being one of its ingredients. It was adjudged that there had been no violation of the statute.¹

¹ N. J. 754. Adulteration, Leach
Food Inspection 418.

¹ N. J. 390; N. J. 292; N. J. 183;
N. J. 192; N. J. 1012.

¹ N. J. 754.

§ 222. Gum Tragacanth.

Gum tragacanth not having the strength required by the United States Pharmacopoeia or National Formulary is adulterated.¹

§ 223. Henbane, Powdered.

A product was labeled "Powdered Henbane, U. S. P." It differed from the standards of strength and purity laid down in the United States Pharmacopoeia, official at the time of investigation, because it contained hyoscyamus muticus, a dangerous drug, and it was adjudged to be adulterated.¹

§ 223a. Kamola.

A product was labeled "ground kamola." It contained a mixture of kamola and 40 percent of sand. To a charge of selling an adulterated drug the accused pleaded guilty.²

§ 224. Laudanum.

Laudanum that falls below the test laid down in the United States Pharmacopoeia is adulterated.¹

§ 225. Peroxide of Hydrogen.

Peroxide of hydrogen containing acetanilid is adulterated.¹

§ 225a. Senna, Gr'd Alex.

A product was labeled "strictly pure Gr'd Alex. Senna." An analysis showed it contained a mixture of senna leaves, stems, powdered sand, and other vegetable tissue, the sand being indicated by the presence of 15.7 percent of ash insoluble in acid. It did not come up to the standard prescribed by the United States Pharmacopoeia, and to a charge of adulteration the defendant pleaded not guilty.²

¹ N. J. 572.

¹ N. J. 754.

² N. J. 1011.

¹ N. J. 459.

¹ N. J. 575.

² N. J. 1010.

§ 226. Soemnoform.

The absence of bromide of ethyl from soemnoform, so that its strength falls below the professed standard of quality under which it is sold, renders it adulterated.¹

§ 226a. Sodio Aluminic Sulphate.

An analysis of sodio aluminic sulphate showed it contained sixty milligrams of metallic arsenic per kilo. It was charged that the product was adulterated for the reason that it contained a poisonous and deleterious ingredient, which might render the article injurious to health; and the court sustained the charge.²

§ 226b. Tragacanth.

A product was labeled "Strictly Pure Powdered Gum Tragacanth." It was a mixture of powdered gum tragacanth and powdered gum. It differed from the standard strength, quality and purity as determined by the tests laid down in the United States Pharmacopoeia, and to the charge of adulteration in this respect the defendant pleaded guilty.³

§ 226c. Turpentine.

Turpentine which contains mineral oil is adulterated.⁴

¹ N. J. 571.

³ N. J. 998.

² N. J. 1000.

⁴ N. J. 1022.

CHAPTER VI.

COLORING, CHEMICALS AND PRESERVATIVES.

SEC.	SEC.
227. Adulteration.	236. Coloring concealing inferiority.
228. External application of preservatives.	237. Certificate and control of dyes permissible for use in coloring foods and food stuffs.
229. Wholesomeness of colors and preservatives.	238. Certificate of straight dyes and mixtures under secondary certificates.
230. Dyes — Chemicals — Preservatives.	239. Definition of the terms "batch" and "mixtures."
231. Prohibition of preservatives.	240. Use of certified colors.
232. Sulphur fumes.	241. Coloring of butter and cheese.
233. Label to show preservatives.	242. Benzoate of soda.
234. List of dyes permitted.	243. Meats and meat products.
235. Entry of vegetables greened with copper salts.	

§ 227. Adulteration.

The Food and Drugs Act provides that an article of food shall be deemed adulterated "if it be mixed, colored, powdered, coated, or stained in a manner whereby damage or inferiority is concealed."¹ Regulation 12 provides as follows:

"(a) Only harmless colors may be used in food products.

"(b) The reduction of a substance to a powder to conceal inferiority in character is prohibited.

"(c) The term 'powdered' means the application of any powdered substance to the exterior portion of articles of food, or the reduction of a substance to a powder.

"(d) The term 'coated' means the application of any substance to the exterior portion of a food product.

"(e) The term 'stain' includes any change produced by the addition of any substance to the exterior portion of foods which in any way alters their natural tint."

¹ Section 7.

Regulation 10 also provides that "only harmless colors or flavors shall be added to confectionery."

§ 228. External Application of Preservatives.

"(a) Poisonous or deleterious preservatives shall only be applied externally, and they and the food products shall be of a character which shall not permit the permeation of any of the preservative to the interior, or any portion of the interior, of the product.

"(b) When these products are ready for consumption, if any portion of the added preservative shall have penetrated the food product, then the proviso of section 7, paragraph 5, under "Foods," shall not obtain, and such food products shall then be subject to the regulations for food products in general.

"(c) The preservative applied must be of such a character that, until removed, the food products are inedible."

§ 229. Wholesomeness of Colors and Preservatives.

"(a) Respecting the wholesomeness of colors, preservatives, and other substances which are added to foods, the Secretary of Agriculture shall determine from chemical or other examination, under the authority of the agricultural appropriation Act, Public 382, approved June 30, 1906, the names of those substances which are permitted or inhibited in food products; and such findings, when approved by the Secretary of the Treasury and the Secretary of Commerce and Labor, shall become a part of these regulations.

"(b) The Secretary of Agriculture shall determine from time to time, in accordance with the authority conferred by the agricultural appropriation Act, Public 382, approved June 30, 1906, the principles which shall guide the use of colors, preservatives and other substances added to foods; and when concurred in by the Secretary of the Treasury and the Secretary of Commerce and Labor, the principles so established shall become a part of these regulations.

¹ Regulation 14.

“(c) It having been determined that benzoate of soda mixed with food is not deleterious or poisonous and is not injurious to health, no objection will be raised under the Food and Drugs Act to the use in food of benzoate of soda, provided that each container or package of such food is plainly labeled to show the presence and amount of benzoate of soda. Food Inspection Decisions 76 and 89 are amended accordingly.”¹

§ 230. Dyes—Chemicals—Preservatives.

“It is provided in regulation 15 of the rules and regulations for the enforcement of the Food and Drugs Act, that the Secretary of Agriculture shall determine by chemical or other examination those substances which are permitted or inhibited in food products; that he shall determine from time to time the principles which shall guide the use of colors, preservatives, and other substances added to foods; and that when these findings and determinations of the Secretary of Agriculture are approved by the Secretary of the Treasury and the Secretary of Commerce and Labor, the principles so established shall become a part of the rules and regulations for the enforcement of the Food and Drugs Act.

“The law provides that no food or food product intended for interstate commerce, nor any food or food product manufactured or sold in the District of Columbia or in any Territory of the United States, or for foreign commerce, except as hereinafter provided, shall contain substances which lessen the wholesomeness or which add any deleterious properties thereto. It has been determined that no drug, chemical, or harmful or deleterious dye or preservative may be used.

¹ Regulation 15. The determination of the Secretary of Agriculture concerning the wholesomeness of colors, preservatives and other substances is not binding on the courts, though of great weight. Persons using colors and preservatives not authorized by the Secretary of Ag-

riculture take their chance on being prosecuted by the government; while those using only those authorized are not prosecuted. Any one using unauthorized colors may show that their use is not in violation of the statute.

Common salt, sugar, wood smoke, potable distilled liquors, vinegar and condiments may be used. Pending further investigation, the use of saltpeter is allowed.

"Pending the investigation of the conditions attending processes of manufacture, and the effects upon health, of the combinations mentioned in this paragraph, the Department of Agriculture will institute no prosecution in the case of the application of fumes of burning sulphur (sulphur dioxid), as usually employed in the manufacture of those foods and food products which contain acetaldehyde, sugars, etc., with which sulphurous acid may combine, if the total amount of sulphur dioxid in the finished product does not exceed 350 milligrams per liter in wines, or 350 milligrams per kilogram in other food products, of which not over 70 milligrams is in a free state.

"No prosecutions will be based on the manufacture, sale, or transportation of foods and food products manufactured or packed during the season of 1907 which contain sodium benzoate in quantities not exceeding one-tenth of 1 percent, or benzoic acid equivalent thereto, provided sodium benzoate or benzoic acid has hitherto been generally used in such food and food products.

"The label of each package of sulphured foods, or of foods containing sodium benzoate or benzoic acid, shall bear a statement that the food is preserved with sulphur dioxid, or with sodium benzoate, or benzoic acid, as the case may be, and the label must not bear a serial number assigned to any guaranty filed with the Department of Agriculture nor any statement that the article is guaranteed to conform to the Food and Drugs Act.

"The use of any dye, harmless or otherwise, to color or stain a food in a manner whereby damage or inferiority is concealed is specifically prohibited by law. The use in food for any purpose of any mineral dye or any coal tar dye, except those coal tar dyes hereinafter listed, will be grounds for prosecution. Pending further investigations now under way and the announcement thereof, the coal tar dyes hereinafter named, made specifically for use in foods, and which

bear a guaranty from the manufacturer that they are free from subsidiary products and represent the actual substance the name of which they bear, may be used in foods. In every case a certificate that the dye in question has been tested by competent experts and found to be free from harmful constituents must be filed with the Secretary of Agriculture and approved by him.

"The following coal tar dyes which may be used in this manner are given numbers, the numbers preceding the names referring to the number of the dye in question as listed in A. G. Green's edition of the Schultz-Julius Systematic Survey of the Organic Coloring Matters, published in 1904.

"The list is as follows:

Red shades:

107. Amaranth.

56. Ponceau 3 R.

517. Erythrosin.

Orange shade:

85. Orange I.

Yellow shade:

4. Naphthol yellow S.

Green shade:

435. Light green S. F. yellowish.

Blue shade:

692. Indigo disulfoacid.

"Each of these colors shall be free from any coloring matter other than the one specified and shall not contain any contamination due to imperfect or incomplete manufacture.

"The question of the entry into the United States of vegetables greened with copper salts has not been finally determined. Pending the determination and decision of this matter by the Secretary of Agriculture, all vegetables greened with copper salts which do not contain an excessive amount of copper will be admitted to entry if the label bears a statement that sulphate of copper and other copper salts have been used.

"This food inspection decision is to be construed in connection with regulations 14 and 31 of the Rules and Regu-

lations for the Enforcement of the Food and Drugs Act. Regulation 14 provides that poisonous and deleterious preservatives shall only be applied externally, and the preservatives in food products shall be of a character which shall not permit the permeation of any preservative to the interior, or any portion of the interior, of the product. It further provides that the preservative must be of such a character that, until removed, the food products are inedible, and that when these products are ready for consumption if any portion of the added preservative shall have penetrated the food product, the said food product shall then be subject to the regulations for food products in general.

“Regulation 31 provides that food products intended for export may contain added substances not permitted in foods intended for interstate commerce, when the addition of such substances does not conflict with the laws of the country to which the food products are to be exported, and when such substances are added in accordance with the direction of the foreign purchaser or his agent.

“No prosecution will be based on the sale of foods and food products manufactured or packed in the United States prior to the issuing of this decision, where the composition of such foods and food products is at variance with the requirements of this decision, if the nature of the variation be plainly stated on the label. In every case, however, the burden of proof will be on the manufacturer to show that the goods were manufactured or packed prior to the date of this decision.”¹

§ 231. Prohibition of Preservatives.

“Section 7 of the Food and Drugs Act, June 30, 1906, provides that, for the purposes of the Act, an article shall be deemed to be adulterated in the case of food if it contain any added poisonous or other deleterious ingredient which may render such article injurious to health. The decision states that it has been determined that no drug, chemical, or

¹ F. I. D. 76.

harmful or deleterious dye or preservative may be used in the preparation of food and food products. The board was influenced in framing this portion of the decision by the following considerations:

“Among those substances added in greater or less amounts to food and food products for the purpose of coloring or of inhibiting bacterial action are those chemical substances which may be classed generically as dyes and preservatives. It is clearly the intent of the Food and Drugs Act to inhibit the use of these substances as well as any others which are poisonous and deleterious to health. Whether or not dyes and preservatives are harmful is a matter which can only be determined by experimental evidence, and both classes have been subjected to investigation with the main idea of determining this point. Not only have investigations been conducted by many leading experts in this and other countries, but extended investigations have been instituted by the Department of Agriculture.

“The classes of substances which have been investigated by the Department of Agriculture include essentially all of the well-known preservatives, including such types as boracic acid and borax, salicylic acid and its salts, benzoic acid and its salts, sulphurous acid and its salts, and formaldehyde.

“The evidence which has accumulated as the result of all these researches conducted in the Department of Agriculture, as well as the result obtained as the outcome of other researches, both in the United States and abroad, points so strongly to the poisonous properties of preservatives that their use as a class should, under the Act, be inhibited in foods and food products.

“In order to obtain the views of eminent physiologists and hygienists, health officers, and physicians in the United States as to the propriety of using preservatives in foods, a list of questions was sent out from the Department of Agriculture, to which a large number of replies was received. These questions and the replies have been tabulated as follows:

1. Are preservatives, other than the usual condimental preservatives, namely, sugar, salt, alcohol, vinegar, spices, and wood smoke, injurious to health?

Affirmative	218
Negative	33
Total	251

2. Does the introduction of any of the preservatives which you deem injurious to health render the foods injurious to health?

Affirmative	222
Negative	29
Total	251

3. If a substance added to food is injurious to health, does it become so when a certain quantity is present only, or is it so in any quantity whatever?

Affirmative	169
Negative	79
Total	248

4. If a substance is injurious to health, is there any special limit to the quantity which may be used which may be fixed by regulation of the law?

Affirmative	68
Negative	183
Total	251

5. If foods can be perfectly preserved without the addition of chemical preservatives, is their addition ever advisable?

Affirmative	12
Negative	247
Total	259

"It can be readily seen from this tabulation that the opinions expressed point overwhelmingly to the fact that preservatives as a class are injurious to health, and hence their use is, under the Act, inhibited."¹

¹ Memorandum to F. I. D. 76.

§ 232. Sulphur Fumes.

“The decision further provides that pending investigation of process of manufacture and of effect upon health, the Department of Agriculture will institute no action where the fumes of burning sulphur are used in the manufacture of foods and foodstuffs containing acetaldehyde, sugars, etc., with which the sulphur dioxid may combine, but the decision limits the total amount of sulphur dioxid in a liter of wine, or a kilogram of other food products, to 350 milligrams, and further provides that only 70 milligrams of this may be in a free state; the residual sulphur dioxid must be in combination with the acetaldehyde, sugars, etc.

“While it is true that sulphurous acid and its salts belong to the class of preservatives which are prejudicial to health, and in consequence their use is inhibited, yet with respect to sulphur dioxid, under certain conditions of use (as in the sulphuring of wine casks in the preparation of wine, in the preparation of evaporated or dried fruits, in the manufacture of certain sugars, etc.), it is rendered more or less inert. There is evidence to show that when sulphur dioxid is used as above indicated it combines, for example, with the acetaldehyde of the wine, thus forming a compound (so-called aldehyde sulphurous acid) which is relatively harmless. In dried fruits in the preparation of which sulphur dioxid has been used there is reason for believing that it may all be present in this so-called “combined” condition, probably to a large extent, if not wholly, in combination with the sugars present. There is also reason for believing that the sulphur dioxid may be combined with protein and cellulose, but probably all of these “combined” forms are not equally inert from a physiological point of view.

“The evidence is not sufficiently conclusive to condemn at present the use of sulphur dioxid under those conditions in which it may be present in this combined form, but it is necessary to limit its presence in such cases as to avoid the presence of excessive quantities of free sulphurous acid, the toxic effect of which is marked.

"The limit in food products has been set at 350 milligrams of total (that is, both free and combined) sulphur dioxide per liter, or kilogram, with an allowance of not over twenty per cent of this amount in a free state. This standard has been reached by a study of a large number of analyses of typical samples of food products which were obtained either in the open market or at ports of entry. That the use of sulphur dioxide in the preparation of wines, evaporated fruits, molasses, etc., has in some cases been greatly abused is apparent from a study of these analyses. To illustrate this point the following analyses of evaporated and dried fruits, purchased in the open market, are given:

	Milligrams of sulphur dioxide per kilo.
Dried peaches	3,072
California apricots	2,842
Evaporated apricots	1,792
Dried apples	1,419
Evaporated apples	1,738

"Especially is this abuse apparent when a comparison is made with other samples, likewise obtained in the open market.

	Milligrams of sulphur dioxide per kilo.
Evaporated raisins	225
Evaporated apricots	190
Evaporated apples	4.5
Evaporated apples	3.3
California prunes	3.3
Dried apples	6.6
Dried apples	9
Fancy cleaned currants	4.5

"Other figures might be quoted to show that very wide variations exist in the total amount of sulphur dioxide found in this class of foods, but these few are sufficient to illustrate the point that there is no 'commercial necessity' for the existence of sulphur dioxide in the very large amounts

shown in the first set of analyses, and in order to protect the public and minimize any possible danger that might arise from undue sulphuring it is necessary to restrict the use of sulphur dioxide within the limits suggested in the accompanying food inspection decision.

"The limit of 350 milligrams of sulphur dioxide is also exceeded in a few samples of molasses on the market to-day. Molasses has been found containing as much as 1,395 milligrams of sulphur dioxide per kilogram. Such cases of undue sulphuring are comparatively rare, and the results of many analyses show that in this class of foodstuffs the sulphur dioxide may by care be reduced to amounts wholly within the limits set.

"The following analyses show the amount of sulphur dioxide usually found in molasses and the ordinary variations to which it is subject:

	Milligrams of sulphur dioxide per kilo.
New Orleans molasses.....	None.
New Orleans molasses.....	310
New Orleans molasses.....	155
B. and O. brand, New Orleans molasses and corn sirup.....	25
Porto Rico molasses.....	8
New Orleans molasses.....	211
Magnolia brand	100
Rockwood molasses (New Orleans).....	359

"In the manufacture of wines it is usually considered that the need for sulphur dioxide is greatest in the nonfortified sweet wines, and in general it may be said that the larger the amount of sugar present the greater is the amount of sulphur dioxide used, but such a rule is by no means universal, illustrating the fact that in sound wines the use of sulphur dioxide is often carelessly controlled and no special pains taken to limit the amount to the quantity necessary to achieve the purpose for which it is used, and thus avoid unnecessary amounts.

"An examination of the wines as they are found to-day on the market shows that it is desirable to restrict the amount

of sulphur dioxid to 350 milligrams per liter. Wines have been offered for import, for example, containing much more than this amount of total sulphur dioxid, but there is every reason to believe that this excessive amount is due to lack of careful control. As the sulphured wine ages the sulphur dioxid, as such, gradually disappears, either by combination with the constituents of the wine or by oxidation.

"A limit must likewise be placed on the free sulphur dioxid. An examination of a large number of sauternes has shown that the amount of free sulphur dioxid which they contain is needlessly high; in some instances this amount has exceeded 200 milligrams per liter, and about 20 percent of all the wines examined exceeded the limit set by this decision. If the amount of free sulphur dioxid in wines is placed at 70 milligrams per liter it is certain that the wines prepared for consumption can be produced in a sound condition, not only well within the maximum set for the free sulphur dioxid but for the total as well. It is absolutely necessary to restrict in some manner the sulphur dioxid in cases in which it is used under conditions such that it may enter into combination with acetaldehyde, sugars, etc., present in food products, and it is believed that under the restrictions suggested the public will be protected from products unduly sulphured during the period which must elapse before experimental evidence can be obtained as to whether a total restriction in the use of sulphur dioxid under all the conditions mentioned is necessary on account of the toxic properties possessed by sulphur dioxid in the combined form."¹

§ 233. Label to Show Preservatives.

"The decision¹ provides that the label of each package of preserved foods, or of foods containing benzoate of soda or benzoic acid, shall bear a statement that the food is preserved with sulphur dioxid or with sodium benzoate, or benzoic acid, as the case may be, and the label must not bear a serial number assigned to any guaranty filed with the De-

¹ Memorandum to F. I. D. 76.

¹ Memorandum to F. I. D. 76.

partment of Agriculture or any statement that the article is guaranteed to conform to the Food and Drugs Act.

“The necessity for these requirements is obvious. Where preservatives are used the labels should inform the consumers of that fact, and it is the opinion of the board that the preserved food does not comply with the law and that it is unfair to the consumer to allow a statement to be made upon the label that the preserved food is guaranteed under the Food and Drugs Act, for the consumer may interpret this statement as to a guaranty that the food is pure.”²

§ 234. List of Dyes Permitted.

“The following list of dyes has been recommended in the decision for use in foods and foodstuffs, pending further investigation and announcement of its results:

Red Shades:

107. Amaranth.

56. Ponceau 3 R.

517. Erythrosin.

Orange shades:

85. Orange 1.

Yellow shades:

4. Naphthol yellow S.

Green shades:

435. Light green S. F. yellowish.

Blue shades:

692. Indigo disulfoacid.

“The decision further states that these coal tar dyes must be made specifically for use in foods and bear a guarantee from the manufacturer that they are free from subsidiary products and represent the actual compound whose name they bear.

“The following statement is necessary in order to illustrate the principles guiding the Department of Agriculture in framing this portion of the decision:

“An extended study of the large number of so-called coal

² Memorandum to F. I. D. 76.

tar dyes which are now in use for the coloring of foods and foodstuffs has been necessary to arrive at a conclusion concerning the restriction, if any, which may be placed on their use, and the department acknowledges the very efficient aid rendered during the course of this study by Dr. Bernhard C. Hesse, of New York City. Dr. Hesse has had an extended experience in this subject through his long association with the leading dyestuff manufacturers in Germany. Since severing his connection with them he has given his time largely to expert work along this line.

“The literature on the subject is very unsatisfactory as to what coal tar products are used, and it is not to be depended upon, because of the equivocal nature of the terminology employed. It is impossible to reduce this terminology to an unequivocal and definite basis for the great majority of such coal tar colors.

“It was impracticable to go to all those in the United States who use coal tar dyes in food products and obtain specimens of the coal tar colors so used. This is true not only because of the large number of such users and their wide geographical distribution, but also because of the reluctance which would undoubtedly be encountered among many such users to disclose the nature of the products employed by them.

“The sources of coal tar materials are limited in number, however. By reference to the book entitled “A Systematic Survey of the Organic Coloring Matters,” by Arthur G. Green, published in 1904, on pages 9 and 10 thereof, it will be seen that there are thirty-seven different concerns in the world engaged in the manufacture of coal tar materials.

“Therefore a canvass of these sources for such coal tar coloring matters as, in their judgment, or in their business practice, they regard as proper for use in food products, seemed the best mode of obtaining a knowledge of the field of the coal tar colors here in question.

“Communication was had, therefore, with thirteen manufacturers of coal tar colors in an endeavor to obtain from them a list of such coal tar colors as, in their judgment or

business practice, were deemed suitable for use in food products. When this cooperation was established, request was also made for information as to the composition of the coal tar samples submitted, and in order to avoid confusion samples were to be identified by reference to the 'Systematic Survey of the Organic Coloring Matters,' by Green, in which each coal tar color has its own number. This information is necessary to reduce the terminology to a common and unequivocal basis. The thirteen manufacturers, or their accredited agents, with whom communication was held probably represent from 85 to 90 percent of the total dyestuff output of the world.

"In order to make provision for the twenty-four makers on the list in the Green tables, and not included in the thirteen makers consulted, a request for samples was made from two New York City houses, who themselves import coal tar colors from sources other than the above, for use in food products. Their products must fairly represent any output not represented by the thirteen makers above mentioned.

"The question of the choice of dyes for the coloring of foodstuffs has been decided on the basis of those dyes which have been submitted by the manufacturers or their accredited agents, but it was impossible to consider any dyes when the manufacturer or the accredited selling agent was unwilling to state unequivocally what the dyes submitted were, so that they could be identified chemically.

"When those interested in placing dyestuffs on the market for the coloring of food have shown unwillingness to give information of this kind, as to what they sell, and by thus selling, recommend, the burden of proof as to the harmlessness of such dyes lies with them, and until such proofs are adduced, the use of such dyes should be inhibited.

"With this knowledge of the specific nature of the dyes recommended, the department has made a study of those concerning which there has been the greatest unanimity of opinion among the manufacturers or their agents as to their fitness; and in the cases where such dyes have been studied as to their physiological action, and the reports have been

favorable, they have been included in the tentative list proposed in the food inspection decision herewith.

"This tentative list of dyes includes a wide range of colors sufficient for all legitimate purposes. Among them are none which are patented, so that their manufacture is open to all interested in the dye industry.

"One point must be particularly emphasized regarding the use of these dyes, namely, the need for the manufacturer's guarantee of purity. It is the manufacturer above all who knows the exact nature of his dyestuffs, and if he is willing to sell his colors for use in food stuffs he should be willing to guarantee that the dyes really are what they are represented to be, that they are not mixtures, and that they do not contain harmful impurities.

"In order to further minimize the possibility of harmful impurities existing in these dyes it has been thought necessary to require a further examination by competent experts, a certificate from whom is necessary, stating that the dyes in question are what they are represented to be."¹

§ 235. Entry of Vegetables Greened with Copper Salts.

"The decision [F. I. D. 76] states:

The question of the entry into the United States of vegetables greened with copper salts has not been finally determined. Pending the determination and decision of this matter by the Secretary of Agriculture all vegetables greened with copper salts which do not contain an excessive amount of copper will be admitted to entry if the label bears a statement that sulphate of copper or other copper salts have been used.'

The greening of vegetables with copper sulphate is practiced to a large extent in some foreign countries, and vegetables so treated are imported into the United States. Before the passage of the Food and Drugs Act the Department of Agriculture, under authority of the yearly appropriation acts, controlled the import of foods. It has been the practice to admit vegetables which did not contain an excessive quantity of copper salts if the artificial color were

¹ Memorandum to F. I. D. 76.

plainly declared on the label. It is the opinion of the board that copper sulphate is injurious and should be prohibited eventually, but it would work a great injury to American importers to put this ruling into effect at once. It is believed that the use of copper sulphate or of other salts of copper in restricted quantities for greening vegetables should be permitted for the pack of the present year, but for no longer."¹

Vegetables greened with copper salts but which do not contain an excessive amount of copper and which are otherwise suitable for food are allowed entry into the United States, if the label bears the statement that sulphate of copper or other copper salts have been used to color the vegetables.²

§ 236. Coloring Concealing Inferiority.

To use coloring matter in a product, so as to change its natural color, is an offense; as the use of annatto in milk,¹ or a coal tar dye in lemon extract so as to conceal its inferiority,² or cherry syrup,³ or olive oil,⁴ or lemon flavoring.⁵

§ 237. Certificate and Control of Dyes Permissible for Use in Coloring Foods and Foodstuffs.

"The Department of Agriculture is in receipt of a large number of inquiries concerning the interpretation to be put on that portion of F. I. D. 76 which refers to coal tar dyes not inhibited for use in coloring foods and foodstuffs.

"The term 'manufacturer,' as used in F. I. D. 76 and in the present decision, applies to a person or company responsible for the purification of the crude or raw dye for the purpose of placing it in a condition fit for use in foods and foodstuffs; or to the accredited selling agent in the United

¹Memorandum to F. I. D. 76.
But see now F. I. D. 102, where this ruling as to the use of salts of copper is modified.

²F. I. D. 102, amending F. I. D. 92.

¹N. J. 586.

²N. J. 585; F. I. D. 536.

³N. J. 549.

⁴N. J. 453.

⁵N. J. 444.

States of such person or company. Such accredited agent must file, on behalf of his foreign principal, if the latter does not file it, a manufacturer's certificate, and it will be considered that the responsibility of such certificate will rest upon the accredited agent and not upon the foreign principal.

"For each permitted dye two certificates must be filed by the manufacturer, the first to be known as the 'Foundation certificate,' the second known as the 'Manufacturer's certificate.' It is suggested that the foundation certificate be in the following form:

FOUNDATION CERTIFICATE.

I,, the undersigned, residing at.....
 (Street address.)
 in the city of....., county of....., State of
, hereby certify under oath that I have personally examined and tested for....., of....., county
 (Full name of concern.) (City.)
 of....., State of....., the material known as....., which corresponds to the coloring material numbered.....in A. G. Green's Edition [1904] of the Schultz-Julius "Systematic Survey of the Organic Coloring Matters," and of which a one (1) pound sample marked.....is herewith submitted. I have found the said material to consist of that coloring matter only, to be free from harmful constituents, and not to contain any contamination due to imperfect or incomplete manufacture.

(Here insert a complete statement of all the tests applied to determine:

A. Identity.

B. Absence of

a. Mineral or metallic poisons.

b. Harmful organic constituents.

c. Contamination due to improper or incomplete manufacture.)

Special attention should be given to setting forth fully the quantities or volume of each material and reagent employed, its strength or concentration, temperature, duration of treatment, limits of delicacy of tests employed, and any other information that is necessary to enable others to repeat accurately and correctly all the work herein referred to and thus arrive at identical results. For each test performed, state what conclusions are drawn from it and why.

.....
 (Signature of chemist making the examination.)

CERTIFICATION.

"For the manufacturer's certificate the following form is suggested:

MANUFACTURER'S CERTIFICATE.

I,, the undersigned, a resident of the United States,
doing business at....., in the city of.....,
(Street address.)

county of....., State of....., under the style
of....., do hereby certify under oath that I am the manu-
(Full name of concern.)

facturer of the material known as....., which corresponds to
the coloring matter numbered.... in the 1904 Green Edition of the Schultz-
Julius Tables, of which the accompanying foundation certificate, signed by
....., the examining chemist, is the report of an analysis of a
fair, average sample drawn from a total batch of.....pounds.

.....
(Signature of manufacturer.)

CERTIFICATION.

"The foundation certificate must be filed with the Secretary of Agriculture at the time the first request is made of the Secretary to use any or all of the permitted dyes for coloring foods and foodstuffs.

"The following form of supplemental certificate is suggested in those cases where a manufacturer desires to apply for permission to place on the market a new batch of a coal tar dye, which dye has already had a foundation certificate and a manufacturer's certificate filed for it.

SUPPLEMENTAL CERTIFICATE.

I,, the undersigned, residing at.....
(Street address.)

in the city of....., county of....., State of
....., hereby certify under oath that I have personally examined and tested for....., of....., county of
(Full name of concern.) (City.)

....., State of....., the material known as
....., which corresponds to the coloring matter numbered
.....in A. G. Green's Edition [1904] of the Schultz-Julius "Systematic Survey of the Organic Coloring Matters," of which a one (1) pound sample

marked.....is herewith submitted, and I have found it to consist of that coloring matter only and to be free from harmful constituents and not to contain any contamination due to imperfect or incomplete manufacture.

This examination was conducted in strict accordance with the detailed scheme of examination fully set forth in the foundation certificate filed

(Date.)

.....
(Signature of chemist.)

CERTIFICATION.

“This supplemental certificate should likewise be accompanied by the same type of manufacturer’s certificate as is described above.

“When the certificates filed with the Department of Agriculture are found to be satisfactory, a ‘lot number’ will be assigned to each batch, which lot number shall apply to that batch alone and to no other batch of the same color.

“According to F. I. D. 76, the seven permitted coal tar dyes therein named, made specifically for use in foods, may be used in foods provided they bear a guaranty from the manufacturer that they are free from subsidiary products and represent the actual substance the name of which they bear. The guaranty herein considered shall be applied as follows:

“Each package sold by the manufacturer should bear the legend ‘Part of Certified Lot Number’ The foundation certificate, as well as the corresponding supplemental certificate, does not apply to any certified dye beyond the package originally prepared by the one establishing this certificate. If such a package be broken and the dye therein contained be repacked, the repacked dye, except as herein-after provided, becomes an uncertified dye, and as such is inhibited.

“There is no objection on the part of the Department of Agriculture to mixtures¹ made from these permitted and certified dyes, by those who have filed certificates with the department, but one (1) pound samples of such mixtures, and the trade name under which each mixture is sold, must be

¹ See Section 239 for definition.

sent to the Secretary of Agriculture, and no such trade name or keyed modification thereof may be used for any other mixture.

"The exact formula—that is, the true names as well as the numbers assigned to the original package and the proportions of the ingredients used—should be deposited with the Secretary of Agriculture, but such formula need not appear on the label; in lieu of which may appear the legend, 'Made from Certified Lots Number and Number, ' etc. If the packages of these mixtures bearing this legend be broken and repacked, the mixture becomes, except as hereinafter provided, an uncertified one, and hence its use is inhibited; that is, the guaranty of the manufacturer shall extend only to the packages prepared by himself and only for so long as they remain in the unbroken form. Whenever new lots of previously established mixtures are made, making use of new certified straight dyes therein, thus necessitating a change in the label, one-pound samples of the new mixtures should be sent to the Secretary of Agriculture.

"The term 'competent experts' as used in F. I. D. 76 applies to those who, by reason of their training and experience, are able to examine coal tar coloring matter to ascertain its identity and to determine the absence of foreign matter not properly belonging to the product, which, if present, renders the substance unfit for use in food products.

"The term 'batch'² as used above is such a quantity of the product as has undergone the same treatment at the same time and the same place as a unit and not otherwise—that is, the lot for one purification.

"Those to whom certification is given with respect to their dyes and a lot number assigned should control the sale of such batches so that they may account to the Department of Agriculture by inspection of their books or otherwise for the destination and disposal of each batch.

"Those using these certified dyes in the preparation of

² See Section 299 for definition.

foods and foodstuffs must be in a position to substantiate the fact that the dyes so used were of a properly certified character.

"There is no guaranty on the part of the Department of Agriculture that because the tests described in any foundation certificate have once been accepted, the permanency of such acceptance is assured.

"In those cases where a package of a straight dye or a mixture of such dyes, bearing proper labels to the effect that they are of a certified lot or lots, is broken and repacked in still smaller lots, or treated with solvents, mixed, etc., the person or company so treating these dyes must stand sponsor for their integrity. This may be accomplished by submitting a statement to the Secretary of Agriculture as follows:

SECONDARY CERTIFICATE.

I,, residing at....., do hereby certify
 (Full address.)
 under oath that I have repacked.....lbs. of certified lot (or lots).....
purchased from....., of.....
 This repacking has been accomplished in the following fashion:.....

 (Full description of what has been done with the lot or lots.)

 (Name.)

CERTIFICATION.

On presentation of this certified form, properly filled out, to the Secretary of Agriculture, a lot number will be assigned, which number should be used in labeling according to the methods already described. If, for example, a portion of lot number '127' is repacked in smaller packages, the lot number '127 A' will be assigned to this repacked dye, to enable the department to follow this into consumption if necessary and still trace it back to the person by whom the dye was originally certified."²

238. Certification of Straight Dyes and Mixtures Under Secondary Certificates.

"In Food Inspection Decision 77 provision is made for the recertification of straight dyes (i. e., the seven accepted dyes of F. I. D. 76) and mixtures thereof, with or without other harmless ingredients.

"Doubt has been expressed as to whether the requirements of F. I. D. 77, with respect to certification, are the same for those who are not manufacturers as they are for manufacturers. This amendment is issued relative to recertification in order to remove uncertainty and to indicate the scope of F. I. D. 77.

"All persons, manufacturers or others, requesting certification of mixtures and recertification of straight dyes, or of mixtures or combinations thereof, shall submit the following form of secondary certificate to the Secretary of Agriculture:

SECONDARY CERTIFICATE.

I,, residing at....., do hereby depose and state that I have
(Full address.)
repacked....lbs. of certified lot (or lots)....purchased from....., of.....
This repacking has been accomplished in the following fashion:
.....
(Full description of what has been done with the lot or lots.)
Certified mixture No. J. D. & Co....., or certified straight dye No. J.
D. & Co.....
Trade name.....
(Name.)
Subscribed and sworn to before me,....., in and for the.....of
.....at....., this....day of.....,

(Name of officer authorized to administer oaths.)

"When the secondary certificate refers to mixtures, the term 'mixture' means—

'not only such mixtures as consist wholly of certified coal-tar dyes but also those which contain one or more certified coal-tar dyes (and no other coal-tar dye or dyes) in combination with other components, constituents, or ingredients not coal-tar dyes, which other components, constituents, or

ingredients are in and of themselves or in the combination used harmless and not detrimental to health or are not prohibited for use in food products; the exact formula of such mixtures, including all of the components, constituents, or ingredients, or other parts of the mixture, together with a statement of the total weight of mixtures so made, must be deposited with the Secretary of Agriculture.'¹

"The term 'straight dye,' as used herein, refers to the seven dyes specified in F. I. D. 76.

"In the case of mixtures one (1) pound samples, and in the case of straight dyes one-half ($\frac{1}{2}$) pound samples must be submitted with the secondary certificate. If larger samples are needed in individual cases the department will ask for them.

"Only those mixtures will be certified which contain no other dyes than coal tar dyes previously certified. Mixtures containing animal or vegetable dyes are not subject to certification.

"The above form for secondary certificates varies but slightly from that given in Food Inspection Decision No. 77. It contains the addition 'Certified mixture No. J. D. & Co.', and 'Certified straight dye No. J. D. & Co.' When the manufacturer or other person submits a secondary certificate, whichever legend is appropriate to the certificate is to be used. The initials are to be those of the person or firm filing the certificate; the blank space is to be filled with the number of the secondary certificate filed by that particular person or firm. For example, the firm of J. D. & Co. has already filed fourteen secondary certificates, the new one to be filed under the form given above will then be labeled 'Certified mixture No. J. D. & Co. 15,' or 'Certified straight dye No. J. D. & Co. 15,' as the case may be. That is, the recertified straight dyes or certified mixtures are to be given a number in regular order, according to the number of such secondary certificates filed by any person or firm. The completed legend is the one to be used in marketing the products thus submitted under the secondary certificate. Notification will be given of the acceptance or rejection of the

¹ F. I. D. 106.

certificate when investigation of the product has been completed.

"Makers of secondary certificates must submit the trade name of mixtures produced, and no such trade name or keyed modification thereof should be used on any other mixture prepared by the same person or company.

"Secondary certificates are to be sent in duplicate to the Department of Agriculture; the duplicate need not, however, be signed or sworn to. The samples should be submitted with the secondary certificates."²

§ 239. Definition of the Terms "Batch" and "Mixtures."

"The definition of the term 'batch' as given on page 4, lines 12 to 14 of Food Inspection Decision 77, is hereby extended to include also the contents of one package, cask, or other container holding 500 pounds or less of dye, even though the contents of such package, cask or container has not undergone the same treatment at the same time and the same place as a unit.

"The word 'mixtures' as used on page 3, line 15 from the bottom, and following, of Food Inspection Decision 77, is hereby declared to mean not only such mixtures as consist wholly of certified coal tar dyes, but also those which contain one or more certified coal tar dyes (and no other coal tar dye or dyes) in combination with other components, constituents, or ingredients not coal tar dyes, which other components, constituents, or ingredients are in and of themselves or in the combination used harmless and not detrimental to health or are not prohibited for use in food products; the exact formula of such mixtures, including all of the components, constituents, or ingredients, or other parts of the mixture, together with a statement of the total weight of mixture so made, must be deposited with the Secretary of Agriculture and a one (1) pound sample thereof must be sent to the Secretary of Agriculture, but such formula need not appear on the label; in lieu of which may appear the

² F. I. D. 129.

legend, 'Made from certified lots Number and Number, etc.,' and no mention need be made of any constituent or constituents other than the certified coal tar dyes employed.'"¹

§ 240. Use of Certified Colors.

"Food Inspection Decision No. 76, published July 13, 1907, gives a list of seven coal tar dyes, which may, without objection from the Department of Agriculture, be used in foods until further notice. Food Inspection Decision No. 77, published September 25, 1907, provides for the certification of dyes. Food Inspection Decision No. 77 was amended March 25, 1909, by Food Inspection Decision No. 106. Some manufactures have succeeded in producing the seven colors, under the conditions outlined in Food Inspection Decision No. 77. Certified dyes are now on the market. Certified dyes may be used in foods without objection by the Department of Agriculture, provided the use of the dye in food does not conceal damage or inferiority. If damage or inferiority be concealed by the use of the dye, the food is adulterated.

"Uncertified coal tar dyes are likely to contain arsenic and other poisonous material, which, when used in food, may render such food injurious to health and, therefore, adulterated under the law.

"In all cases where foods subject to the provisions of the Food and Drugs Act of June 30, 1906, are found colored with dyes which contain either arsenic or other poisonous or deleterious ingredient which may render such foods injurious to health, the cases will be reported to the Department of Justice and prosecutions had.

"The department is in possession of facts which show that there are so-called vegetable colors on the market which contain excessive quantities of arsenic, heavy metals and contaminations due to imperfect or incomplete manufacture. While the department has raised no objection to the use of

¹ F. I. D. 106.

vegetable colors, *per se*, yet the use of colors even of vegetable origin, open to the objection of excessive arsenic, etc., should not be used for coloring food products."¹

§ 241. Coloring of Butter and Cheese.

"Numerous inquiries, of which the following is an illustration, have been received by the department:

"Will you kindly inform me concerning the coloring of butter and cheese under the pure food law? Would it be unlawful to color butter and cheese as now practiced?"

"The coloring matter of butter is specifically permitted in the law of August 2, 1886 (24 Stat., 209), and the coloring of cheese in the law of June 6, 1896 (29 Stat., 253). It is held by the department that the Food and Drugs Act does not repeal the provisions of the Acts referred to above and the addition of harmless color to these substances may be practiced as therein provided, and that the presence of a coloring matter specifically recognized by Acts of Congress as a constituent is not required to be declared on the label."¹

§ 242. Benzoate of Soda.

The Referee Board of Consulting Scientific Experts in February, 1909, made the following report, as the result of their investigation, on the use of benzoate of soda in food: (1) "Does a food to which there has been added benzoic acid, or any of its salts, contain any added poisonous or other added deleterious ingredients which may render the said food injurious to health? (a) In large quantities? (b) In small quantities?

"(2) If benzoic acid or any of its salts be mixed or packed with a food, is the quality or strength of said food thereby reduced, lowered, or injuriously affected? (a) In large quantities? (b) In small quantities?

"To obtain satisfactory answers to these questions the board has felt it necessary to carry through a careful inves-

¹ F. I. D. 117.

¹ F. I. D. 51.

tigation of the effect of benzoic acid or some one of its salts on the nutrition and general health of man. A thorough study on the literature giving the results of work done by various investigators on the physiological effects of benzoic acid and its salts, together with a study of reported clinical and medical observations, therapeutic usage, etc., have made it apparent that additional work was needed to render possible a conclusive answer to the above questions.

"With a view to limiting the scope of the work, while at the same time meeting all practical requirements, our investigation, with the consent of the Secretary of Agriculture, has been confined to a study of the effect of the sodium salt of benzoic acid, viz., sodium benzoate.

"To make this experimental inquiry as thorough as possible, and to minimize the personal equation, three independent investigations have been carried out—one at the medical school of Northwestern University, in Chicago, under the charge of Prof. John H. Long, of that institution; a second at the private laboratory of Prof. Christian A. Herter, of Columbia University, New York City; and the third at the Sheffield Scientific School of Yale University, in charge of Prof. Russell H. Chittenden.

"The same general plan of procedure was followed in all three experiments. A certain number of healthy young men were selected as subjects, and during a period of four months these men, under definite conditions of diet, etc., with and without sodium benzoate, were subjected to thorough clinical and medical observation, while the daily food and excretions were carefully analyzed, and otherwise studied, and comparison made of the clinical, chemical, bacteriological, and other data collected. (For details, see the individual reports.) In this manner material has been brought together which makes possible conclusions regarding the effects of small and large doses of sodium benzoate upon the human system.

"In fixing upon the amount of sodium benzoate that should constitute a 'small dose,' we have adopted 0.3 gram of the salt per day. Manufacturers of food products, which in their view require the use of a preservative, are in general

content with 0.1 percent of sodium benzoate. This would mean that in the eating of such a preserved food the consumer would need to take 300 grams per day, or nearly two-thirds of a pound of preserved food to ingest an amount of benzoate equal to our minimal daily dosage. Looked at from this point of view, our dosage of 0.3 gram per day seemed a fair amount for a 'small dose,' one that would clearly suffice to show any effect that small doses of the salt might exert, especially if continued for a considerable length of time. In all these four experiments this daily dosage was continued for a period of about two months. Under 'large dose' was included quantities of sodium benzoate ranging from 0.6 gram to 4 grams per day. Such a daily dosage was continued for a period of one month. In a few instances somewhat larger doses were employed.

"As the amount and character of the daily diet exert a well-known influence upon many of the metabolic or nutritive changes of the body, as well as upon the bacterial flora of the intestines, attention is called to the fact that the three investigations differed from each other in the amount of protein food consumed daily, thereby introducing a distinctive feature which tends to broaden the conditions under which the experiments were conducted.

"The conclusions reached as a result of the individual investigations are given at length in the separate reports herewith presented, together with all of the data upon which these conclusions are based.

"The fact should be emphasized that the results obtained from these three separate investigations are in close agreement in all essential features.

"The main general conclusions reached by the Referee Board are as follows:

"First.—Sodium benzoate in small doses (under 0.5 gram per day) mixed with the food is without deleterious or poisonous action and is not injurious to health.

"Second.—Sodium benzoate in large doses (up to 4 grams per day) mixed with the food has not been found to exert any deleterious effect on the general health, nor to act as a

poison in the general acceptance of the term. In some directions these were slight modifications in certain physiological processes, the exact significance of which modifications is not known.

"Third.—The admixture of sodium benzoate with food in small or large doses has not been found to injuriously affect or impair the quality or nutritive value of such food."¹

§ 243. Meats and Meat Products.

The regulations adopted under the Food and Drugs Act do "not apply to domestic meat and meat-food products which are prepared, transported or sold in interstate or foreign commerce under the meat-inspection law and the regulations of the Secretary of Agriculture made thereunder."¹ The regulations governing the meat inspection by the United States Department of Agriculture permit in meat and meat products the use of "common salt, sugar, wood smoke, vinegar, pure spices," and saltpeter. No colors can be used except such as are approved by the Secretary of Agriculture. The use of colors and preservatives permitted by the Meat Inspection Act² is permitted under the Food and Drugs Act.

¹ F. I. D. 104, amending F. I. D. 76 and F. I. D. 89. See F. I. D. 89, F. I. D. 101. accordingly follows the suggestions of this report.

¹ Regulation 39.

The Department of Agriculture

² See Appendix.

CHAPTER VII.

MISBRANDING.

ART. I. FOOD.

ART. II. FOOD DECISIONS.

ART. III. DRUGS AND MEDICINES.

ART. IV. DRUG AND MEDICINE DECISIONS.

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§ 244. Food—Statute.

“That for the purposes of this Act an article shall be deemed misbranded, in case of food :

“First. If it be an imitation of or offered for sale under the distinctive name of another article.

“Second. If it be labeled or branded so as to deceive or mislead the purchaser, or purport to be a foreign product when not so, or if the contents of the package as originally put up shall have been removed in whole or in part and other contents shall have been placed in such package, or if it fail to bear a statement on the label of the quantity or proportion of any morphine, opium, cocaine, heroin, alpha or beta eucaine, chloroform, cannabis indica, chloral hydrate, or acetanilide, or any derivative or preparation of any of such substances contained therein.

“Third. If in package form, and the contents are stated in terms of weight or measure, they are not plainly and correctly stated on the outside of the package.

“Fourth. If the package containing it or its label shall bear any statement, design or device regarding the ingredients or the substances contained therein, which statement, design or device shall be false or misleading in any particular: Provided, That an article of food which does not contain any added poisonous or deleterious ingredients shall not be deemed to be adulterated or misbranded in the following cases :

“First. In the case of mixtures or compounds which may be now or from time to time hereafter known as articles of food, under their own distinctive names, and not an imitation of or offered for sale under the distinctive name of another article, if the name be accompanied on the same label or brand with a statement of the place where said article has been manufactured or produced.

“Second. In the case of articles labeled, branded or tagged so as to plainly indicate that they are compounds, imitations, or blends, and the word “compound,” “imitation,” or “blend,” as the case may be, is plainly stated on the package

in which it is offered for sale: Provided, That the term blend as used herein shall be construed to mean a mixture of like substances, not excluding harmless coloring or flavoring ingredients used for the purpose of coloring and flavoring only: And provided further, That nothing in this Act shall be construed as requiring or compelling proprietors or manufacturers of proprietary foods which contain no unwholesome added ingredient to disclose their trade formulas, except in so far as the provisions of this Act may require to secure freedom from adulteration or misbranding.”¹

§ 245. Labels.

“(a) The term ‘label’ applies to any printed, pictorial or other matter upon or attached to any package of a food or drug product, or any container thereof subject to the provisions of this Act.

“(b) The principal label shall consist, first, of all information which the Food and Drugs Act, June 30, 1906, specifically requires, to wit, the name of the place of manufacture in the case of food compounds or mixtures sold under a distinctive name; statements which show that the articles are compounds, mixtures or blends; the words ‘compound,’ ‘mixture,’ or ‘blend,’ and words designating substances or their derivatives and proportions required to be named in the case of foods and drugs. All this information shall appear upon the principal label, and should have no intervening descriptive or explanatory reading matter. Second, if the name of the manufacturer and place of manufacture are given, they

¹ Section 8.

The product shipped in interstate commerce must not be misbranded, but it must be labeled with labels conforming to the requirements of the statute. The statute requires a descriptive paper affixed to the package, which must include the statement of how much alcohol, etc., is contained in the package, in case of drugs. *United States v.*

Sixty-five Casks Liquid Extracts, 170 Fed. 449.

“The purpose was to protect the public against deception in the purchase of drugs and food by punishing adulteration and misbranding as therein defined.” *United States v. American Druggists’ Syndicate*, 186 Fed. 387; *United States v. Johnson*, 177 Fed. 313.

should also appear upon the principal label. Third, preferably upon the principal label, in conjunction with the name of the substance, such phrases as 'artificially colored,' 'colored with sulphate of copper,' or any other such descriptive phrases necessary to be announced, should be conspicuously displayed. Fourth, elsewhere upon the principal label other matter may appear in the discretion of the manufacturer. If the contents are stated in terms of weight or measure, such statement should appear upon the principal label, and must be couched in plain terms, as required by Regulation 29.

"(c) If the principal label is in a foreign language, all information required by law and such other information as indicated above in (b) shall appear upon it in English. Besides the principal label in the language of the country of production, there may be also one or more other labels, if desired, in other languages, but none of them more prominent than the principal label, and these other labels must bear the information required by law, but not necessarily in English. The size of the type used to declare the information required by the Act shall not be smaller than 8-point (brevier) capitals: Provided, That in case the size of the package will not permit the use of 8-point type, the size of the type may be reduced proportionately.

"(d) Descriptive matter upon the label shall be free from any statement, design or device regarding the article or the ingredients or substances contained therein, or quality thereof, or place of origin, which is false or misleading in any particular. The term 'design' or 'device' applies to pictorial matter of every description, and to abbreviations, characters, or signs for weights, measures or names of substances.

"(e) An article containing more than one food product or active medicinal agent is misbranded if named after a single constituent.

In the case of drugs the nomenclature employed by the United States Pharmacopoeia and the National Formulary shall obtain.

"(f) The use of any false or misleading statement, design,

or device appearing on any part of the label shall not be justified by any statement given as the opinion of an expert or other person, nor by any descriptive matter explaining the use of the false or misleading statement given as the opinion of an expert or other person, nor by any descriptive matter explaining the use of the false or misleading statement, design or device."¹

§ 246. Name and Address of Manufacturer.

"(a) The name of the manufacturer or producer, or the place where manufactured, except in case of mixtures and compounds having a distinctive name, need not be given upon the label, but if given, must be the true name and the true place. The words 'packed for ———,' 'distributed by ———,' or some equivalent phrase, shall be added to the label in case the name which appears upon the label is not that of the actual manufacturer or producer, or the name of the place not the actual place of manufacture or production.

"(b) When a person, firm or corporation actually manufactures or produces an article of food or drug in two or more places, the actual place of manufacture or production of each particular package need not be stated on the label except when in the opinion of the Secretary of Agriculture

¹ Regulation 17.

"The terms 'brand' and 'label' as used in this connection are perfectly clear and definite. They indicate a statement, design, or device affixed to an article." "The plain sense of the language in question is that it embraces any statement, design, or device regarding the article, which appears on the outside of the package in which the drug is offered for sale, whether such statement be printed upon or otherwise affixed to the package itself or impressed upon a separate label which is then affixed to the package. An advertising circular en-

closed with an article inside the carton in which it is offered for sale neither induces the sale nor deceives the prospective purchaser, and is not within the purview of the Act." *United States v. American Druggists' Syndicate*, 186 Fed. 387.

"It would be unthinkable that Congress intended that a product could be seized in one district and not in another for a misleading brand, according or not as the generality of persons in those districts understood or were deceived by the brand on the particular product." *N. J.* 990.

the mention of any such place, to the exclusion of the others, misleads the public.”¹

§ 247. Character of Name.

“(a) A simple or unmixed food or drug product not bearing a distinctive name should be designated by its common name in the English language; or if a drug, by any name recognized in the United States Pharmacopoeia or National Formulary. No further description of the components or qualities is required, except as to content of alcohol, morphine, etc.

“(b) The use of a geographical name shall not be permitted in connection with a food or drug product not manufactured or produced in that place, when such name indicates that the article was manufactured or produced in that place.

“(c) The use of a geographical name in connection with a food or drug product will not be deemed a misbranding when by reason of long usage it has come to represent a generic term and is used to indicate a style, type or brand; but in all such cases the State or Territory where any such article is manufactured or produced shall be stated upon the principal label.

“(d) A foreign name which is recognized as distinctive of a product of a foreign country shall not be used upon an article of domestic origin except as an indication of the type or style of quality or manufacture, and then only when so qualified that it can not be offered for sale under the name of a foreign article.”¹

¹ Regulation 18.

¹ Regulation 19.

“The great object of the statute is to prevent injury to health and deception by words or devices on the label which may naturally lead the purchaser to believe that he is getting one thing when in reality he is getting another. Certainly the manufacturer meets all these requirements when he truthfully

describes the elements of his product by the use of common nouns which fairly describe the things which enter into it, according to the English vocabulary and adds, as he is not required to do by the Federal statutes, an analysis of the life-giving properties of the different elements, thus affording additional means of judging of the real value of the blend for cattle

§ 248. Distinctive Name.

“(a) A ‘distinctive name’ is a trade, arbitrary, or fancy name which clearly distinguishes a food product, mixture or compound from any other food product, mixture or compound.

“(b) A distinctive name shall not be one representing any single constituent of a mixture or compound.

“(c) A distinctive name shall not misrepresent any property or quality of a mixture or compound.

“(d) A distinctive name shall give no false indication of origin, character or place of manufacture, nor lead the purchaser to suppose that it is any other food or drug product.”¹

§ 249. Compounds, Imitations or Blends without Distinctive Name.

“(a) The term ‘blend’ applies to a mixture of like substances, not excluding harmless coloring or flavoring ingredients used for the purpose of coloring and flavoring only.

“(b) If any age is stated, it shall not be that of a single one of its constituents, but shall be the average of all constituents in their respective proportions.

“(c) Coloring and flavoring can not be used for increasing the weight or bulk of a blend.

“(d) In order that colors or flavors may not increase the volume or weight of a blend, they are not to be used in quantities exceeding 1 pound to 800 pounds of the blend.

“(e) A color or flavor can not be employed to imitate any natural product or any other product of recognized name and quality.

“(f) The term ‘imitation’ applies to any mixture or compound which is a counterfeit or fraudulent simulation of any article of food or drug.”¹

food, the use for which it is manufactured and put upon the market.” N. J. 990.

¹ Regulation 20. See N. J. 990.

¹ Regulation 21.

The first clause in this regulation is founded upon the first proviso in Section 8, which is as follows: “The term blend as used herein shall be construed to mean

§ 250. Articles Without a Label.

"It is prohibited to sell or offer for sale a food or drug product bearing no label upon the package or no descriptive matter whatever connected with it, either by design, device

a mixture of like substances, not including harmless coloring or flavoring ingredients used for the purpose of coloring and flavoring only."

In one case the court said: "If the substances so blended are not harmless, the statement on the label that they are blended is not sufficient to secure immunity. The defendants contend that this restrictive proviso applies only where the blend is claimed without disclosure of ingredients, and has no application where, as here, the component parts of the blend are disclosed. This construction seems to be too narrow. One prime object of the legislation is to prevent the public from being misled or deceived. In view of the language of the Act we are justified in saying that the term 'blend,' as here displayed on the label, is an assurance to the public that the mixture consists of like substances, and in the present case it is an assurance that 'Saratoga Brand Vinegar' consists of two like substances, that is, distilled vinegar and a vinegar derived from apple cider. In this regard the label is false and misleading. We have seen how naturally the buyer might be misled by a casual examination of the label. The use of the term 'label' coupled with a specific reference to the pure product, is well calculated to confirm such mistake, in

view of the guaranty that the vinegar sold under this brand meets the requirements of the national pure food law. Special significance is thus given to the statutory definition of the term 'blend.' It is true that boiled apple cider might be used as a harmless agent to give color or flavor to the distilled vinegar, but in such a case the boiled cider would be an infusion as distinguished from a 'blend,' and the public would be entitled to notice of its use for that qualified purpose. Here it is presented to the public as a blend, which is falsely misleading, because it is conceded that no vinegar whatever is contained in these packages." The label was as follows:

SARATOGA BRAND VINEGAR.

a blend of

PURE BOILED APPLE CIDER

and

DISTILLED VINEGAR.

The court held that the product was improperly labeled. *United States v. Ten Barrels of Vinegar*, 186 Fed. 399, and in doing so distinguished the following cases where it was held that the law had not been violated: *In re Wilson*, 168 Fed. 566; *United States v. Bockmann*, 176 Fed. 382 ("Compound." "Pure Comb and Strained Honey and Corn Syrup"); *United States v. Sixty-eight Cases of Syrup*, 172 Fed. 782 (extract of maple and refined corn sugar).

or otherwise, if said product be an imitation of or offered for sale under the name of another article.”¹

§ 251. Proper Branding not a Complete Guaranty.

“Packages which are correctly branded as to character of contents, place of manufacture, name of manufacturer or otherwise, may be adulterated, and hence not entitled to enter into interstate commerce.”¹

§ 252. Incompleteness of Branding.

“A compound shall be deemed misbranded if the label be incomplete as to the names of the required ingredients. A simple product does not require any further statement than the name or distinctive name thereof, except as provided in Regulations 19(a) and 28.”¹

§ 253. Substitutions.

“(a) When a substance of a recognized quality commonly used in the preparation of a food or drug product is replaced by another substance not injurious or deleterious to health, the name of the substituted substance shall appear upon the label.

“(b) When any substance which does not reduce, lower or injuriously affect its quality or strength, is added to a food or drug product, other than that necessary to its manufacture or refining the label shall bear a statement to that effect.”¹

§ 254. Waste Materials.

“When an article is made up of refuse materials, fragments or trimmings, the use of the name of the substance from which they are derived, unless accompanied by a statement to that effect, shall be deemed a misbranding. Packages of such materials may be labeled ‘pieces,’ ‘stems,’ ‘trimmings,’ or with some similar appellation.”¹

¹ Regulation 27.

¹ Regulation 23.

¹ Regulation 24.

¹ Regulation 25.

¹ Regulation 26.

§ 255. Mixtures or Compounds with Distinctive Names.

“(a) The terms ‘mixtures’ and ‘compounds’ are interchangeable, and indicate the results of putting together two or more food products.

“(b) These mixtures or compounds shall not be imitations of other articles, whether simple, mixt, or compound, or offered for sale under the name of other articles. They shall bear a distinctive name and the name of the place where the mixture or compound has been manufactured or produced.

“(c) If the name of the place be one which is found in different States, Territories or countries, the name of the State, Territory or country, as well as the name of the place, must be stated.”¹

§ 256. Substances Named in Drugs or Foods.

“(a) The term ‘alcohol’ is defined to mean common or ethyl alcohol. No other kind of alcohol is permissible in the manufacture of drugs except as specified in the United States Pharmacopoeia or National Formulary.

“(b) The words alcohol, morphine, opium, etc., and the quantities and proportions thereof, shall be printed in letters corresponding in size with those prescribed in Regulation 17, paragraph (c).

“(c) A drug, or food product except in respect of alcohol, is misbranded in case it fails to bear a statement on the label of the quantity or proportion of any alcohol, morphine, opium, heroin, cocaine, alpha or beta eucaine, chloroform, cannabis indica, chloral hydrate or acetanilide, or any derivative or preparation of any such substances contained therein.

“(d) A statement of the maximum quantity or proportion of any such substances present will meet the requirements, provided the maximum stated does not vary materially from the average quantity or proportion.

“(e) In case the actual quantity or proportion is stated, it shall be the average quantity or proportion with the variations noted in Regulation 29.”

¹ Regulation 27. See N. J. 900.

“(f) The following are the principal derivatives and preparations made from the articles which are required to be named upon the label:

“ALCOHOL, ETHYL: (Cologne spirits, grain alcohol, rectified spirits, spirits and spirits of wine.)

Derivatives—

Aldehyde, ether, ethyl acetate, ethyl nitrite, and paraldehyde.

Preparations containing alcohol—

Bitters, brandies, cordials, elixirs, essences, fluid-extracts, spirits, syrups, tinctures, tonics, whiskies, and wines.

MORPHINE, ALKALOID:

Derivatives—

Apomorphine, dionine, peronine, morphine acetate, hydrochloride, sulphate, and other salts of morphine.

Preparations containing morphine or derivatives of morphine—

Bougies, catarrh snuff, chlorodyne, compound powder of morphine, crayons, elixirs, granules, pills, solutions, syrups, suppositories, tablets, triturates, and troches.

OPIMUM, GUM:

Preparations of Opium—

Extracts, denarcotized opium, granulated opium and powdered opium, bougies, brown mixture, carminative mixtures, crayons, Dover's powder, elixirs, liniments, ointments, paregoric, pills, plasters, syrups, suppositories, tablets, tinctures, troches, vinegars, and wines.

Derivatives—

Codeine, alkaloid, hydrochloride, phosphate, sulphate, and other salts of codeine.

Preparations containing codeine or its salts—

Elixirs, pills, syrups, and tablets.

COCAINE, ALKALOID:

Derivatives—

Cocaine hydrochloride, oleate, and other salts.

Preparations containing cocaine or salts of cocaine—

Coca leaves, catarrh powders, elixirs, extracts, infusion of coca, ointments, paste pencils, pills, solutions, syrups, tablets, tinctures, troches, and wines.

HEROIN:

Preparations containing heroin—

Syrups, elixirs, pills, and tablets.

ALPHA AND BETA EUCAINE:**Preparations—**

Mixtures, ointments, powders, and solutions.

CHLOROFORM:**Preparations containing chloroform—**

Chloranodyne, elixirs, emulsions, liniments, mixtures, spirits, and syrups.

CANNABIS INDICA:**Preparations of cannabis indica—**

Corn remedies, extracts, mixtures, pills, powders, tablets, and tinctures.

CHLORAL HYDRATE (Chloral, U. S. Pharmacopoeia, 1890):**Derivatives—**

Chloral acetophenonoxim, chloral alcoholate, chloralamide, chloral orthoform, chloralose, dormiol, hypnal, and uraline.

Preparations containing chloral hydrate or its derivatives—

Chloral camphorate, elixirs, liniments, mixtures, ointments, suppositories, syrups, and tablets.

ACETANILIDE (*Antifebrine, Phenylacetamide*):**Derivatives—**

Acetphenetidine, citrophen, diacetanilide, lactophenin, methoxy-acetanilide, methylacetanilide, para-iodoacetanilide, and phenacetine.

Preparations containing acetanilide or derivatives—

Analgesics, antineuralgics, antirheumatics, cachets, capsules, cold remedies, elixirs, granular effervescing salts, headache powders, mixtures, pain remedies, pills, and tablets.”¹

§ 257. Misbranding Defined—Statute.

The Food and Drugs Act of 1906 provides: “That the term ‘misbranded,’ as used herein, shall apply to all drugs, or articles of food, or articles which enter into the composition of food, the package or label of which shall bear any statement, design, or device regarding such article, or the ingredients or substances contained therein which shall be false or misleading in any particular, and to any food or drug product which is falsely branded as to the State, Territory or country in which it is manufactured or produced.

“That for the purposes of this Act an article shall also be deemed to be misbranded:

¹ Regulation 28.

"In case of drugs:

"First. If it be an imitation of or offered for sale under the name of another article.

"Second. If the contents of the package as originally put up shall have been removed, in whole or in part, and other contents shall have been placed in such package, or if the package fail to bear a statement on the label of the quantity or proportion of any alcohol, morphine, opium, cocaine, heroin, alpha or beta eucaine, chloroform, cannabis indica, chloral hydrate, or acetanilide, or any derivative or preparation of any such substances contained therein."¹

§ 258. Unintentional Misbranding.

The statute makes no distinction between an intentional and an unintentional misbranding. The object of the statute is to protect the public against imposition, and unintentional

¹ Section 8.

"To fully inform you as to what is meant by the law by 'misbranded,' I will state what the law requires, because the law uses the word 'misbranding' and then defines it, and the court and jury are bound by the definition of misbranding as laid down in the law. The term applies to all drugs or articles of food, or articles which enter into the composition of food, 'the package or label of which shall bear any statement, design, or device regarding such article or the ingredients or substances contained therein which shall be false or misleading in any particular.' You will notice how broad the law is in its definition. If it is found from the evidence that in any particular this drug known as 'Harper's Cuforhedake' misstates or states falsely, then the law has been violated. It is not necessary

that each one and all of them have been broken, but the law says 'in any particular.' So that if you find from the evidence that in any one point there has been a misbranding under the definition which I have read to you then you shall find a verdict of guilty." *United States v. Harper*. Notice of Judgment. 25.

It is no defense on a charge of misbranding whisky, that the brand was placed upon the packages containing the liquor by the United States gauger upon information received from the distiller in accordance with the usual practice, or that the same kind of liquor had for a number of years been so branded and sold under such brand, to the knowledge of the agents and officers of the United States. *United States v. Fifty Barrels of Whisky*, 165 Fed. 986.

imposition is just as disastrous to it as an intentional one. Any one who unwittingly misbrands an article of food or drug is as liable to the penalty of the statute as if he did it designedly, though no doubt the court would bear in mind the fact that the accused had no intention to violate the statute when fixing the amount of the fine.¹

§ 259. Trade Marks.

If a device or design be calculated to deceive or mislead the purchaser, then the manufacturer can not shield himself under the fact that such device or design is a registered trade mark. Trade marks that are deceptive as to the quality of goods will not be protected by the courts from infringement by others, nor can their use be insisted upon if they deceive the purchaser when placed upon an article of food. Section 8 of the Pure Food and Drugs Act is broad enough to prevent the use of a counterfeit of a "design" or "device" used by an honest manufacturer by another. When the counterfeit is so used by another on an article of food it is "misbranded," for it is a representation that the article is made by the person lawfully entitled to use such design or device.¹

§ 260. Package of Food Need Not Be Labeled.

It is to be observed that the statute does not require an

¹ See *United States v. Fifty Barrels of Whisky*, 165 Fed. 966.

It is no defense for a druggist who is prosecuted for selling an adulterated drug in violation of Act of Congress, February 17, 1898 (30 Stat. 246), relating to the adulteration of foods and drugs in the District of Columbia, to show simply that he was at the time of sale, or of possession for sale, ignorant of the fact that the drug was adulterated, as he must know what he sells, or proposes to sell,

and that it conforms to the standard prescribed by law. *District of Columbia v. Lynham*, 16 App. D. C. 85.

"It should be noticed that although the indictment alleges a wilful fraud, the shipment is punished by the statute if the article is misbranded, and that the article may be misbranded without any conscious fraud at all." *United States v. Johnson*, 219 U. S. —, 31 Sup. Ct. 627, 55 L. Ed. —.

¹ See *N. J.* 184.

article of food or a drug to be labeled or branded unless it contains certain specified substances or is otherwise of a character that renders it liable to be prohibited as adulterated without some statement of character or quality. But there is a limit to this statement. Thus in case of a drug or food, "if it be an imitation of or offered for sale under the distinctive name of another article," it is misbranded, and Regulation 22 provides as follows: "It is prohibited to sell or offer for sale a food or drug product bearing no label upon the package or no descriptive matter whatever connected with it, either by design, device or otherwise, if said product be an imitation of or offered for sale under the name of another article." But if a name or device be used when not necessary, it must be such as will not mislead the public; it must be a true name. In an instance of a drug which is recognized by the United States Pharmacopoeia or National Formulary, it must, if it bear any name, bear the name recognized in one or the other of these two authoritative publications. But the common English name of the drug may be used, rather than its technical name. In fact, a technical labeling may be such as to convey no information to the purchasing public concerning what it is. Thus it is permissible to use the term "Epsom Salts," the English name, instead of "Magnesium Sulphate," its technical equivalent.

§ 261. Failure to Brand Drug is to Misbrand it—Label Defined.

It has been contended that a total failure to label or brand an article of food or a drug does not come within the statute providing a penalty for misbranding an article, but unsuccessfully. "In construing the terms of the statute," said Judge Dayton of the Northern District of West Virginia, "it is further insisted that a criminal offense can not be created by implication, but only by direct and positive terms. Granting at once these several propositions to be sound, the crucial question is, Does the Food and Drugs Act in express terms require drug products to be labeled? The argument

of counsel, that Congress intended by this Act, not to correct the evil of failing to label, but of falsely and fraudulently labeling, and therefore drug products, even when put up in packages suitable for retailing, but which bear no labels, are not within the misbranding provisions of the Act, is ingenious but untenable, and wholly refuted by the express terms of the Act. The first section of it makes it 'unlawful for any person to manufacture within any Territory or the District of Columbia any article of food or drug which is adulterated or misbranded,' within the meaning of the Act. This is an unqualified prohibition against the manufacturing itself, so far as the Congress had the power to prohibit it; that is, in these parts of the country over which it had full control and jurisdiction. Section two provides that: "The introduction into any State or Territory or the District of Columbia, from any other State or Territory or the District of Columbia, or from any other foreign country, or shipment to any foreign country, of any article of food or drugs which is adulterated or misbranded, within the meaning of this Act, is hereby prohibited.

"Here was the exercise to the fullest limit, by Congress, of its power, under the interstate commerce clause of the Constitution, to prevent adulterated and misbranded food and drug products from being placed upon the markets and sold as pure and genuine ones in the several States by expressly banishing them from lawful interstate commerce. In view of these express provisions, I can not hold with counsel that the evil intended by Congress to be met was simply the false and deceptive branding of drug products and not the sale thereof. The question, therefore, recurs to whether this Act in such direct terms requires the labeling of drug products offered for sale in the original package as to subject one failing to do so to a criminal prosecution or to confiscation of the property. The two sections from which I have quoted expressly provide for criminal prosecution and penalties for their violation. Sections 6, 7 and 8 of this Act define the terms 'drug' and 'food' as used; what articles of each shall

be deemed adulterated, and what articles of each shall be deemed misbranded. It is provided that:

“The term ‘misbranded’ as used herein, shall apply to all drugs, or articles of food, or articles which enter into the composition of food, the package or label of which shall bear any statement, design or device regarding such article, or the ingredients or substances contained therein which shall be false or misleading in any particular.”

“And further, ‘if the package fail to bear a statement on the label of the quantity or proportion of any alcohol,’ and other specified substances contained therein. Counsel insist that these provisions do not directly require a label, and that, in order to warrant prosecution, the provision should have been, in effect:

“For the purposes of this Act an article shall also be deemed to be misbranded: In cases of drugs . . . if the package or other container thereof fail to bear a label.’

“I think this is too technical, even under the strict rules governing the construction of criminal statutes. Suppose the provision had read, ‘if the package fail to bear a statement on a label of the quantity of alcohol,’ etc., would it not as well meet the view of counsel? A label is defined by Webster to be ‘a slip of paper, parchment, etc., affixed to anything, and indicating the contents, ownership, destination,’ etc. The use of the word itself, therefore, carries the meaning that it is a descriptive paper affixed to the package, and in express terms the Act requires the descriptive matter borne by the paper to include the statement of how much alcohol, etc., is contained in the package. It does not seem to me that the ruling in the case of *United States v. Twenty Boxes of Corn Whisky*¹ can be made at all applicable here. There an entirely different character of statute was being construed. It did not attempt to bar from interstate commerce the article unbranded, but only to bar the shipment ‘under any other than the proper name or brand known to the trade,’ of spirituous or fermented liquors or wines. This statute was unquestionably passed to prevent fraud upon the revenue,

¹ 133 Fed. 910, 67 C. C. A. 214.

and not as a regulation of interstate commerce. It follows that the first ground of defense must be unavailing.”²

§ 262. Form of Label.

“The following is an extract from a letter recently received:

‘We do not understand the requirements of the regulations respecting the arrangement of labels; that is, the order in which the various features of the labels should be arranged.’

“To meet the requests for the opinion of the Department regarding the proper arrangement of a label, the following order is suggested:

“1. Name of substance or product.

“2. In case of foods, words which indicate that the articles are compounds, mixtures or blends, and the word ‘Imitation,’ ‘Compound’ or ‘Blend,’ as the case may be.

“3. Statements designating the quantity or proportion of the ingredients enumerated in the law, or derivatives and preparations of same,¹ as mentioned under Regulation 28; also statements of other extraneous substances whose presence should be declared, such as harmless coloring matter, or any necessary statement regarding grade or quality.

“(The statements specified in paragraphs 1, 2 and 3 should appear together, without any intervening descriptive or explanatory matter.)

“4. Name of manufacturer (if given).

“5. Place of manufacture (if given, when required in case of food mixtures or compounds bearing a distinctive name).

“It is stated in Regulation 17 that if the name of the manufacturer and place of manufacture be given they should appear upon the principal label. Although the law does not require that the name of the manufacturer be given, or the place of manufacture, except in case of food mixtures and

² *United States v. Knowlton Danderine Co.*, 170 Fed. 449; N. J. 284; affirmed 175 Fed. 1022.

¹ Attention is called to the fact

that the declaration of alcohol and its derivatives is not required in foods.

compounds having a distinctive name, it is held that if they are given they must be true, and should be placed with the required information on the principal label. The arrangement of the label is the same for both food and drug products, and an example of each is given.

Sample label for food product.

<p>[Name of product.]</p> <p>[Declaration required by paragraphs 2 and 3.]</p>	<p style="text-align: center;">KETCHUP. ARTIFICIALLY COLORED.</p> <hr style="width: 20%; margin: 10px auto;"/> <p style="text-align: center;">[Descriptive matter, if desired, but preferably at bottom of label.]</p> <hr style="width: 20%; margin: 10px auto;"/> <p style="text-align: center;">BLANK & CO., PORTLAND, ME.</p> <hr style="width: 20%; margin: 10px auto;"/> <p style="text-align: center;">[Descriptive matter, is desired.]</p>
<p>[Name of manufacturer, if given.]</p> <p>[Place of manufacture, if given.]</p>	

Sample label for drug product.

<p>[Name of product.]</p> <p>[Declarations required by paragraphs 2 and 3.]</p>	<p style="text-align: center;">COUGH SYRUP. ALCOHOL, 10 PERCENT. MORPHINE, ½ GRAIN PER OUNCE. CHLOROFORM, 40 MINIMS PER OUNCE.</p> <hr style="width: 20%; margin: 10px auto;"/> <p style="text-align: center;">[Descriptive matter, if desired, but preferably at bottom of label.]</p> <hr style="width: 20%; margin: 10px auto;"/> <p style="text-align: center;">JOHN JONES & CO., WASHINGTON, D. C.</p> <hr style="width: 20%; margin: 10px auto;"/> <p style="text-align: center;">[Descriptive matter, if desired.]</p>
<p>[Name of manufacturer, if given.]</p> <p>[Place of manufacture, if given.]</p>	

“Any descriptive or explanatory matter that may appear on the principal label, therefore, should be placed at the bottom of the label, or between No. 3 and No. 4, and should be clearly separated from other features of the label by means

of a suitable line or space. Statements regarding the reason for using alcohol, artificial coloring matter, and other extraneous substances, come under the head of descriptive or explanatory matter, and should not be interspersed with the declarations required under Nos. 2 and 3.

"The information called for under No. 3 should be so worded as to give only the required information, as, for example, 'alcohol 17 percent' or 'artificially colored.' All numbers used in expressing quantity or proportion of substances required to be stated (see Regulation 28) should be expressed in the Arabic notation.

"Each substance required to be declared under No. 3 should be printed on a separate line and in type specified in Regulation 17(c)."

§ 263. The Package to Be Labeled.

The provisions of the Act concerning labeling applies directly to the original package, which is the case, box, barrel, in which cans, bottles, cartons or other retail packages are shipped from the manufacturer, producer or packer to the jobber, wholesaler or retailer, or from the jobber or wholesaler to his customer. They also apply to individual cans, bottles, cartons and other packages enclosed in a case, box, barrel or outer package. This is unquestionably true of food products or drugs shipped into or out of the District of Columbia or into or out of any Territory.

§ 264. Approval of Labels.

"Numerous requests are referred to this Department for the approval of labels to be used in connection with articles of food and drugs under the Food and Drugs Act of June 30, 1906. This Act does not authorize the Secretary of Agriculture nor any agent of the Department to approve labels. The Department therefore will not give its approval to any label. Any printed matter upon the label implying that this Department has approved it will be without warrant. It is

believed that with the law and the regulations before him the manufacturer will have no difficulty in arranging his label in harmony with the requirements set forth. If there be questions on which there is doubt respecting the general character of labels, decisions under the Food and Drugs Act will be rendered, of a public character, and published from time to time, covering such points."¹

§ 265. Substance Named on Label Not the Leading One in the Article.

If the substance named on the label is not the leading one in the article of food, and is so small a part thereof as to constitute but a very small fraction of such article, then it is misbranded, for the manufacturer has no right to thus deceive the public. Such would be the case with extract of lemon, where the lemon juice was but a small fraction of the total amount of the product. In one of the food decisions it was said: "It is further held that the use of an ingredient in small quantity simply for the purpose of naming it in the list of ingredients would be contrary to the intent of the law, and therefore that the ingredients must be used in quantities which would justify the appearance of their names upon the label."¹

§ 266. Distinctive Names of Foods.

Any mixture or compound of food which does not contain any added poisonous or deleterious ingredient can not be deemed misbranded if under its own "distinctive name," "and not an imitation of or offered for sale under the distinctive name of another article, if the name be accompanied on the same label or brand with a statement of the place where said article has been manufactured or produced."¹

¹ F. I. D. 41.

¹ F. I. D. 42; F. I. D. 99; F. I. D. 98.

But if the dictum in *United States v. American Druggists' Syndicate*, 186 Fed. 387, is to be fol-

lowed, these rulings of the Agricultural Department may be regarded as of doubtful soundness. See Section 405.

¹ Section 8.

The term "distinctive name" means the trade description by which an article of food is known to the public. It also includes generic names, such as coffee, tea, flour, sugar, lemon juice, chocolate, vanilla, as well as fanciful or arbitrary names which a manufacturer puts upon the market, and which are, in fact, trade-mark names. If an article be not coffee, then it can not be labeled "coffee,"² and so cane syrup can not be labeled "maple syrup," or cotton-seed oil "olive oil," if it be not the genuine article; nor can a Brazilian coffee be labeled "Mocha" coffee. Nor can a foreign name be used on a domestic article. Examples of this can be found with reference to Roquefort cheese, which is a foreign well-known cheese, and to brand a cheese with the word "Roquefort" is to convey the meaning that it is of foreign manufacture—an imported cheese. There is no objection, however, to a domestic cheese made in the type or style of Roquefort cheese being labeled "Roquefort Style" or "Roquefort Type," but the word "type" or "style" must be so plainly printed on the label as to prevent its being overlooked by the purchaser.³

§ 267. Use of Different Kinds of Type to Deceive Purchasers.

It is not an uncommon practice of manufacturers to comply with all the requirements concerning labels so far as to make an accurate statement of the contents of the package or can, but to use different kinds of type, so as to attract the attention of the purchaser to the inferior or adulterated qualities of the article. Such labeling is considered to be a misbranding. A few illustrations may be given. Thus, a cheese was branded, "Blue Ribbon Brand Neufchatel Style Cheese." The words "Neufchatel Cheese" were in large type, and the word "Style" in small, inconspicuous type. This was done for the purpose of deceiving and misleading the purchaser into the belief that the cheese was a well-known for-

² As "Cereal Coffee." F. I. D. 50. had put nothing on his product

³ "The manufacturer here would but the name Corno Horse and have fully obeyed the statute if he Mule Feed." N. J. 990.

eign product of superior quality, when in fact it was a domestic article, as the label truthfully indicated; but the branding or labeling was such as to mislead the average purchaser. It was adjudged that the cheese was misbranded.¹ A similar ruling was made where a can was labeled "Broiled California Mackerel-Pilchard or Sardinia Caeruleus." The product in the can was not "California Mackerel," but was California sardines; and the words "Pilchard or Sardinia Caeruleus" were printed in very small, insignificant letters, noticeable only upon close inspection. This was considered a misbranding.² So where a product was labeled "Currant Jelly" in large letters, followed by the words "Blended with Apple and Other Fruit Juices," in such small letters that it was calculated to mislead and deceive the public into the belief that the product was in fact currant jelly when it was only a mixture, as the words in small type indicated. It was held that the product was mislabeled.³

§ 268. Waste Material in Foods.

The regulations provide that: "Where an article is made up of refuse materials, fragments or trimmings, the use of the name of the substance from which they are derived, unless accompanied by a statement to that effect, shall be deemed a misbranding. Packages of such materials may be labeled 'pieces,' 'stems,' 'trimmings,' or with some other appellation."¹ If the article of food is made of such materials, and it is not unfit for food and contains no added substance which is considered deleterious, it may be sold if labeled in accordance with this regulation. Such an article of food must not be passed off for an article better than it really is. But if an article of food is made out of pieces, stems or trimmings that are unfit for food, then the proper labeling of it will not save it from the charge of adulteration.

¹ N. J. 291; N. J. 565; N. J. 341.

² N. J. 365.

³ N. J. 415. See also N. J. 811, N. J. 835.

¹ Regulation 26.

§ 269. "Manufactured for," "Prepared for," "Distributed by," Used on Labels.

"Numerous inquiries are received relative to the marking of products not manufactured by the party in whose name they are sold. The following are representative:

'We prepare products on the special prescription of the customer, shipping the same to him in barrels to be rebottled, labeled, and packed for the market. Many of our customers are asking how the law affects this business.

'Manufacturing chemists ship goods to us, made according to our formula; we bottle and label the goods. Should our name appear on the labels as manufacturers or distributors? All of our remedies are given a distinctive name.

'If we put up a cough remedy for John Smith & Co., would it be sufficient to label it "Sold by," or must it be labeled "Prepared for John Smith & Co."?

'Will it be necessary to have appear on the label our name as the actual manufacturer of the product or will it only be necessary that the words "Prepared only by" be cut out of the label and instead the words "Prepared for" be printed thereon, just before the name of the Blank Chemical Company? You will, we think, appreciate that, as the preparation is made over their private formula and for their account, we acting merely as the agent for this manufacturer, we should not care to have our name attached to it or to any other preparation of this kind put out by another concern and should be obliged to discontinue the business entirely should it be required that our name appear on the labels for this preparation.

'I would respectfully call your attention to the injustice the enforcement of Regulation 18 (a) of Circular 21 will be to manufacturers of plain unmixed food products like sweet corn or tomatoes. This regulation enables jobbers to demand that their names be placed on the labels to the exclusion of that of the manufacturer and to enforce their demand. The remedy is a simple one and seems to be wholly within the intent of the law, viz., require that the name of manufacturer and place of manufacture be put upon every package offered for sale, and that it be held misbranded if this is not the conspicuous feature of all labels on all packages of food, whether plain, mixed, or compounded.'

"In considering the above inquiries it should be borne in mind that the law forbids all forms of misrepresentation. Food mixtures and compounds having 'distinctive names' must in all cases bear the name of the place of manufacture. No drug products, whether simple, mixed or compounded,

with or without 'distinctive names,' are required to bear the name of the manufacturer or producer, or the place where manufactured or produced, except when sold under proper name brands, i. e., brands in which both the given name and the surname are used. All food and drug products sold under such proper name brands should bear the name of the manufacturer or producer and the place of manufacture or production. In all cases where the name of party or place is stated upon the label, such name must be the true name of the actual manufacturer, producer or packer, and the true name of the place where the article was manufactured, produced or packed.

"If, for trade reasons, when not required by law, a name or a place be given upon the label of foods or drugs manufactured or packed for any person, firm or corporation by another person, firm or corporation, one of two forms of labels is allowed, viz:

"(a) The name of the actual manufacturer or packer and the place where the goods were actually manufactured or packed may be given; or

"(b) The name of the person, firm or corporation for whom the goods are manufactured or packed, or by whom they are distributed, may be given, if preceded by the words 'prepared for,' 'manufactured for,' 'distributed by,' etc. The phrase 'sold by' is not satisfactory. The approved phrase shall be set in type not smaller than eight-point (brevier) caps.

"This rule holds even if the formula or prescription be furnished or owned by the parties for whom the goods are manufactured or packed.

"Foods and drugs repackaged within a State and sold only within that State are not subject to the Federal law; but repackaged foods or drugs which enter interstate commerce, or which are sold in the District of Columbia or in the Territories, are subject to the law, and should be labeled in accordance with this decision."¹

¹ F. I. D. 68. See also N. J. 990.

§ 270. Imitations of Foods—Intent—Mistake.

The statute expressly declares that in case of food an article shall be deemed misbranded "if it be an imitation of or offered for sale under the distinctive name of another article."¹ This prohibition applies to all foods covered by trade marks under fanciful names that are imitations of other foods. But imitations of foods may be sold if they are properly labeled or branded as such. They must be labeled, branded or tagged so as to plainly indicate that they are imitations, and the word "imitation" must be plainly stated on the package in which it is offered for sale. Regulation 21 declares that the term "imitation applies to any mixture or compound which is a counterfeit or fraudulent simulation of any article of food or drug." Regulation 22 provides as follows. "It is prohibited to sell or offer for sale a food or drug product bearing no label upon the package or no descriptive matter whatever connected with it, either by design, device or otherwise, if said product be an imitation of or offered for sale under the name of another article." Notwithstanding an article is properly branded, yet if it be not wholesome or free from deleterious ingredients, capable of or intended for use in the same way as the substance of which it is an imitation, and as a substitute for such substance, it can not be put on the market. "Now," said a court in its charge to the jury, "there is another question to which your attention must be directed by the court, and that is the question of intent—as to whether the defendant intentionally committed the offense charged in the information. Now, gentlemen, in most criminal trials it is necessary for the government to establish beyond a reasonable doubt that the accused intended to violate the statute, and the person charged with crime should not be convicted if it appears that the offense was due to a mistake or inadvertence—that is to say, absence of intent to violate the statute. Usually in criminal trials the intent is presumed from the facts and circumstances, and follows as a necessary consequence of the act; hence the defendants, if they knew

¹ Section 8.

their product was an imitation of the other, and was not a distinctive article, then you may assume the defendant must be held responsible under the Act in question. The Pure Food and Drugs Act does not expressly provide that shippers or dealers must knowingly or wilfully violate its provisions; but if, as it is claimed by the defendants, this label was put on inadvertently, or by mistake by employes whom he had hired, and who had not become sufficiently familiar with their duties, it is my opinion, then, gentlemen, that he ought not to be held guilty of these two counts. On the other hand, if it is your opinion that this claim made at this time is merely a subterfuge, that the article in fact was misbranded, and that it is now claimed to have been a mistake in bad faith, in order to escape liability under the statute, then manifestly you will give little heed to the claim of mistake or inadvertence. Of course, if a dealer in a commodity of this character is to escape punishment, if persons are to be permitted to misbrand their goods and send them into interstate commerce, and then may be heard to say that they did not intend to violate the statute, if they are not to be held liable as a necessary consequence of their act, this statute which is now before us will not remedy the evils that Congress designed it to remedy by its enactment.”²

§ 271. Mixtures or Compounds of Foods.

“An article containing more than one food product or active medicinal agent is misbranded if named after a single constituent.”¹ The statute provides that “the case of mixtures or compounds which may be now or from time to time hereafter known as articles of food, under their own distinctive names, and not an imitation of or offered for sale under the distinctive name of another article,” shall not be deemed misbranded “if the name be accompanied on the same label or brand with a statement of the place where said article has been manufactured or produced.” “In the case of articles labeled, branded, or tagged so as to plainly indi-

² N. J. 806.

¹ Regulation 17.

cate that they are compounds, . . . the word 'compound' must be "plainly stated on the package in which it is offered for sale."² The words "mixture" and "compound" have practically the same meaning, and are so construed by the Department of Agriculture, and that meaning, in this connection, is the putting together two or more food products. But all the products thus compounded must be food products; a food product can not be compounded with a mineral or non-food product. To mix a mineral or non-food product with a food product is expressly forbidden by the statute.³ A compound of two or more food products need not be labeled with the names of the ingredients, or even labeled or branded with the word "compound" or "mixture," if such compound or mixture is now or may hereafter be known as an article of food under a "distinctive name,"⁴ by which is meant either a trade description usually or commonly employed or the name applied to a proprietary food; but in such an instance there must be placed on the label a statement where the article was manufactured or produced. If a compound or mixture be not known under a "distinctive name," then either the word "mixture" or "compound" must be used on the label, and must stand alone and without qualification.⁵ The fact that the mixing of two or more ingredients lowers the grade of one of them is no objection to the product thus compounded. An illustration of this is the addition of flour or meal to pure mustard; but the compound thus made must not be offered as pure mustard, yet it is not treated as adulterated if plainly labeled as a mixture or compound. But a mixture or compound can not be made for the purpose of concealing inferiority or damage; nor can one be made which contains poisonous or deleterious ingredients. If wheat and rye flour be mixed, the product can not be sold either as wheat or rye flour, but the legend on the label must show that it is a mixture of wheat and rye flours.⁶ The use of an ingredient in a small quantity for the purpose of nam-

² Section 8.

³ Section 7.

⁴ Section 8.

⁵ See F. I. D. 42, F. I. D. 47.

⁶ F. I. D. 42.

ing it in the list of ingredients does not authorize so naming it, for the ingredients must be present in substantial quantities. The words "mixture" and "compound" must not be confused with "blend." From the latter they differ, not necessarily being limited to the product resulting from the mingling together of like substances, while the statute expressly limits a blend to a mingling of like substances.⁷

§ 272. Blends of Foods—Distinctive Name.

The statute provides that "the term blend as used herein shall be construed to mean a mixture of like substances, not excluding harmless coloring or flavoring ingredients used for the purpose of coloring and flavoring only."¹ A blend differs from a "mixture" or "compound," for they "indicate the results of putting together two or more food products," and may be the "putting together two or more" dissimilar substances, while a blend must be the putting together of "like substances." "Coloring and flavoring can not be used for increasing the weight or bulk of a blend," and "in order that colors or flavors may not increase the volume or weight of a blend they are not to be used in quantities exceeding one pound to eight hundred pounds of the blend."² A color or flavor can not be recognized to imitate any natural product or any other product of recognized name and quality.³ These two last clauses must be read together with the clause in the statute providing that imitations, if properly labeled or tagged, shall not be deemed misbranded.⁴ Colors or flavors in the production of foods that are imitations are not prohibited if such foods are offered for sale for what they actually are. In other sections will be found a discussion concerning the blending of whiskies, which it is not necessary here to repeat. "The manufacturer," said Justice Jones of the Middle District of Alabama, "without violating any of the provisions of the statute against adulteration, may mix

⁷ See F. I. D. 65.

³ Regulation 21.

¹ Section 8.

⁴ Section 8.

² Regulation 21.

any number of constituents in his compound, so long as these constituents are not poisonous or deleterious to health and he gives the compound a distinctive name and states where it is manufactured. The matter thus produced is 'the article of food' whose quality and strength the statute seeks to preserve, and the nature of the product in these respects is fixed and determined by the elements which enter into it. . . . Putting in a mixture of things which may be lawfully blended therein can not amount to adulteration of the blend, since, other things aside, the statute declares, its other conditions being complied with, the blend shall not thereby 'be deemed to be adulterated.' ''⁸

§ 273. Proprietary Foods—Formula.

The statute provides "that nothing in this Act shall be construed as requiring or compelling proprietors or manufacturers of proprietary foods which contain no unwholesome added ingredient to disclose their trade formulas, except insofar as the provisions of this Act may require to secure freedom from adulteration or misbranding."¹ But notwithstanding this provision, proprietary foods are subject to the general provisions of the statute both with regard to adulteration and misbranding. If such foods contain substances prohibited by the statute, or if they are materially different in character or quality from what they are represented to be, their manufacturers or proprietors are subject to the penalties provided for in sections four and five of the statute. Proprietors of such foods must, therefore, disclose on the label so much of the formula as is necessary to comply with the general requirements of the Act regarding misbranding. Regulation 8 provides that "manufacturers of proprietary foods are only required to state upon the label the names and percentages of the materials used, insofar as the Secretary of Agriculture may find this to be necessary to secure freedom from adulteration and misbranding," and "the factories in which pro-

⁸ N. J. 990.

¹ Section 8.

prietary foods are made shall be open at all reasonable times to the inspection provided for in Regulation 16.”²

§ 274. Fictitious Names.

“The following extract from a letter is typical of a question frequently asked:

‘In connection with our manufacture of flavoring extracts, we produce an article containing a certain percentage of artificial coumarin and vanillin. This product has been placed on the market under the name of ——— and Company, a fictitious firm, although dealers have always understood that it was our product. Is there any objection to our continuing to brand the product as manufactured by ——— and Company?’

“The same question has frequently been asked by importers who state that they desire to assume the responsibility for particular brands.

“It has been held by the Attorney-General (F. I. D. 2) that—

‘the words “. . . Daisy Sugar Corn, ——— ——— Company, Milwaukee, Wis.,” clearly imply that the goods referred to are manufactured or prepared by that company in Wisconsin. The general public, unfamiliar with trade practices, would inevitably reach that conclusion.’

“Regulation 18 provides that if the name of the manufacturer and the place of manufacture be given, they must be the true name and the true place. It would appear, therefore, that the use of a fictitious name in such a manner that it would be understood to be the name of the manufacturer would be clearly a violation of Regulation 18. It is apparent that the provisions of Regulation 18 will not be fulfilled by the nominal incorporation of a fictitious firm. The regula-

² Regulation 16 is as follows: “The Secretary of Agriculture, when he deems it necessary, shall examine the new materials used in the manufacture of food and drug products, and determine whether any filthy, decomposed or putrid substance is used in their prepara-

tion,” and “The Secretary of Agriculture shall make such inspections as often as he may deem necessary.”

It has been doubted if the statute affords a basis of that portion of Regulation 8 above quoted.

tions require that goods must be actually manufactured by the firm represented on the label as the manufacturer.

“When a proper name, other than that of the manufacturer, is placed upon a label, it must not be used in the possessive. For instance,

CHARLES GASTON'S
OLIVE OIL
BORDEAUX

can only be properly used on an oil manufactured by Charles Gaston at Bordeaux. The same is true if the designation

GASTON'S
OLIVE OIL
BORDEAUX

be employed.

“On the other hand, the word ‘Gaston’ might be used in an adjective sense, and not in the possessive case as qualifying the words ‘olive oil,’ in a manner that would indicate that it represented a brand and not a manufacturer, as

GASTON'S OLIVE OIL

Or,

OLIVE OIL, GASTON BRAND

In such case, however, neither given name nor initials should be employed. The word ‘Gaston’ should be in the same type as ‘olive oil’ and in equal prominence, thus forming a part of the label.

“The phrase ‘Olive Oil, Charles Gaston Brand,’ may be used, in which case the name of the actual manufacturer should appear, in order that no false indication of the name of the person or firm manufacturing the product may be given.”¹

§ 275. Name of Manufacturers.

The name of the manufacturer is often a guaranty in the market of the quality and purity of the manufactured product. In time these names often become practically trade marks, though not capable of registration. By a long usage

¹ F. I. D. (as amended) 46.

the public becomes used to the names attached to foods or drugs, and rely upon them. To permit a manufacturer to use a name thus established as a cloak for inferior goods is to permit a misbranding of the article, and to clearly fall within the prohibition of the Pure Food and Drugs Act on the question of misbranding. The statute does not require the name of the manufacturer to be placed upon the label, but if one be placed thereon it must be the name of the actual manufacturer. The mere placing of a name of a person or corporation upon a manufactured product is sufficient to carry the impression to the general public that such person or corporation manufactured the product thus labeled, without words to the effect that it was "manufactured by" such person or corporation, and is, therefore, a misbranding if not true. In the instance of a jobber or wholesaler, distributor, importer, agent, or the like, who desires to place his name upon the article, no objection can be taken to such usage if the name be accompanied by the words "packed for," "distributed by," "agent," "importer," or other words, so as to indicate that the name is not used as a manufacturer or producer. The only restriction in the use of names is that a name must not be used which gives out the impression that its owner is the manufacturer or compounder of the article upon which it is placed; and this difficulty can be overcome by the proper use of language in connection therewith. But a name which a packer or manufacturer has the right to use as an assignee or successor can not be held to be a fictitious or improper name. The use of any fictitious name which purports to be the name of the manufacturer clearly falls within the prohibition of the statute, though the use of fictitious names on the labels is not expressly prohibited by the statute.¹

§ 276. Deceptive Labeling of Foods—Foreign Labels.

The statute provides that if food "be labeled or branded

¹ N. J. 580. To state on the label that it was manufactured by a particularly named person, when it was not manufactured by him, is to mislabel the article. N. J. 184.

so as to deceive or mislead the purchaser, or purport to be a foreign product when not so," it shall be deemed mislabeled or misbranded; so it is taken as misbranded or mislabeled "if it be an imitation of or offered under the distinctive name of another article."¹ These are very broad terms, and would seem to cover every possible case of so labeling or branding food as to deceive the public either as to its quality, character or origin. These provisions reach all instances of the use of labels in a foreign language, or of foreign names as the manufacturer's or producer's name, when used upon foods of a domestic origin in such a way as to lead the purchaser to believe it is of foreign origin. Such is a case where the name of a foreign locality is used as the locality of origin. If the label be in the English language, its repetition in a foreign language,—nor would additional representations thereto in a foreign language,—be deemed a mislabeling, if truthful? But a label and all necessary information must be in the English language. Yet the principal label may be "in a foreign language," but "all information required by law and such other information" as Regulation 17 requires must "appear upon it in English. Besides the principal label in the language of the country of production, there may be also one or more other labels, if desired, in other languages, but none of them more prominent than the principal label, and these other labels must bear the information required by law, but not necessarily in English." Descriptive matter upon the label must be "free from any statement, design or device regarding the article or the ingredients or substances contained therein, or quality thereof, or place of origin, which is false or misleading in any particular."² "The use of any false or misleading statement, design or device appearing on any part of the label shall not be justified by any statement given as the opinion of any expert or other person, nor by any descriptive matter explaining the use of the false or misleading statement given as the opinion of an expert or other person, nor by any descriptive matter ex-

¹ Section 8.

² Regulation 17.

plaining the use of the false or misleading statement, design or device.”³

§ 277. False or Misleading Label, Design or Device.

To label any article that is an imitation of any food or drug as a genuine article, or “under the name of another article,” is to violate the statute. The object of the statute is to enable the purchaser when purchasing an article to ascertain from an examination of the statement or legend on the label just what are the contents of the package, bottle or carton to which it is attached; and if that statement or legend be false in whole or part, the object of the statute is perverted. A pictorial reproduction may as effectually mislead him as a direct statement in words, and is just as much a misbranding as a false statement. Thus, if a picture of a beehive and bees be placed upon a can of imitation or adulterated honey, the inference to be drawn therefrom is that it is pure bee honey, and if it be not it is misbranded or mislabeled. So take an instance of maple sugar or syrup, where maple leaves or a sugar camp is placed upon the label, when the sugar or syrup is not pure maple sugar or syrup; or an instance of placing coffee plants or scenes from coffee plantations upon packages not containing pure coffee. All such pictures hold out the idea that the articles upon which they are placed are pure articles of the kind it is intended to depict by their use, and are clearly acts of misbranding. Thus, a box of macaroni was labeled “Molino e pastificio a vapore Napoletano San Giovanni a Teduccio.” In addition to these words the label bore a picture or design depicting a body of water with a smoking volcano in the distance, a Maltese cross, a lion, the monogram “A. R.,” and a number of medals, on one of which was inscribed “Victor Emanuel, Italia.” The picture design and words were to deceive the purchaser, for the reason that they purported that the macaroni in question was a foreign product, signifying and importing that it had been manufactured in the vicinity of Naples, Italy, and

³ Regulation 17.

that after being so manufactured it had been imported into the United States from that country. In fact, the macaroni had been manufactured in the city of Philadelphia. It was held that it was improperly labeled.¹

§ 278. False Indication of Origin—Geographical Names.

There is nothing in the statute which requires the label to contain a statement concerning the place where the article of food or drug had its origin, or where it was manufactured, except in the case of compounds or mixtures having a distinctive name.¹ But if a name be given as the place of the manufacture of the food or drug then the true name of its origin must be given. Thus, to label a can of fish "Broiled California Mackerel" when the fish was not taken in the State of California is to mislabel them.² So to label a firkin of butter "The Elgin Butter Company, Elgin, Illinois," when the butter was made and put up in Wisconsin, is to falsely brand it.³ So to use the words "Caracas Cocoa," when it comes from the State of Zulia in Venezuela, and not from either Rio Caribe, Guiria, Carupano, Rio Chico, Higuerto, and other places of the eastern coast of Venezuela, is to mislabel or misbrand it, for the brand gives it a false origin.⁴ There are many foods or drugs—particularly foods—that have acquired in the markets a reputation for excellence or a peculiar flavor. Such is Vermont Maple Syrup, Michigan apples, Maine canned corn, Baltimore oysters, Delaware peaches, Wisconsin cranberries, Elgin butter, Kentucky whisky, Indian River oranges, Smithfield hams, Western New York grapes, Ohio wine, and the like. These are geographical names in the nature of trade marks. The right to use them belongs not to any individual in particular, but to the producers located within a certain region. In the law of

¹ N. J. 600; N. J. 167; N. J. 262; N. J. 487.

A picture of a churn placed on oleomargarine is a representation that it is butter. *People v. Griffin*, 128 N. Y. Supp. 946.

¹ Section 8.

² N. J. 365.

³ N. J. 67.

⁴ N. J. 114.

trade marks they are known as "Regional Marks" or "Collective Marks." In foreign countries these "Regional Marks" are often protected, and are not infrequently subject to treaty arrangements between them. On April 14, 1891, Great Britain, France, Spain, Portugal, Switzerland, Tunis and Brazil entered into a treaty at Madrid, having for its express purpose the suppression of false indications of origin. To prevent deception by the use of a geographical name it is provided in Regulation 19 that their use "shall not be permitted in connection with a food or drug product not manufactured or produced in that place, when such name indicates that the article was manufactured or produced in that place." One of the decisions of the Board of Food and Drug Inspection covers this phase of the question. It is as follows:

"There are many cases which have been considered by the Board of Food and Drug Inspection in which it has been necessary to decide whether or not, in its opinion, certain geographical names have been sufficiently generic to indicate a style, type or brand, and in consequence might be used without offending any of the provisions of the Food and Drugs Act. Among the geographical names which have been under consideration are 'Rocky Ford' as applied to cantaloupes, and 'Indian River' as applied to oranges.

"The Rocky Ford melon is not a new variety of melon, but is one of the older varieties of melons which in the environment of Rocky Ford, Colo., has attained particular excellence.

"The same remark applies to the Indian River oranges of Florida. They are not a new variety, but various varieties which in the environment of the Indian River have attained unusual excellence.

"The board holds that the terms 'Rocky Ford' and 'Indian River' have not become sufficiently generic to indicate styles, types or brands of melons and oranges, respectively, but that these geographical names are only properly applied to the product of the restricted area for the melons which are grown in or near Rocky Ford, and for the product grown in

or near the Indian River. Inasmuch as the term 'Rocky Ford' has thus become associated with a melon of particular excellence of a certain geographical locality, the board holds that it is unlawful to sell in interstate commerce melons not grown in the Rocky Ford district as 'Rocky Ford Seed' melons. The terms are nearly alike, the intent is to deceive, and the law provides that a label should not be false or deceptive in any particular.'"⁵

This question is presented in another phase. Thus, the use of a geographical name may have been so long continued as to indicate a kind of product rather than it is from a peculiar district or country. Such is the case of the word "Champagne" when applied to a wine. In the district of Champagne, France, a peculiar wine was made which became known as "Champagne Wine." The process of manufacture was different from that of ordinary wines, resulting in an agreeable taste. In time the production of wine by a similar process was undertaken, resulting in a wine similar to that produced in Champagne, and to this production was applied the term "Champagne Wine." So universal has the use of the term become that it no longer indicates the place of the origin of wine upon which it is used, but it does indicate a kind of wine. Another illustration is the use of the word "calico." It now means a peculiar product, and not that it was made in Calicut, India. The words "Concord grapes" now indicate a grape of a distinctive flavor and growth, and not that they are raised in Concord, Massachusetts, where the grape originated. The same is true of the Delaware grape, which had its origin in Concord. The use of the words "Concord" and "Delaware" now merely indicate a kind of grape, and not that they were grown in a particular locality. To meet this phase of the trade a paragraph of Regulation 19 provides as follows:

"The use of a geographical name in connection with a food or drug product will not be deemed a misbranding when by reason of long usage it has come to represent a generic term and is used to indicate a style, type, or brand; but in all such cases the State or Territory where any such

⁵ F. I. D. 115.

article is manufactured or produced shall be stated upon the principal label."

If a manufacturer produces goods in several States, "the actual place of manufacture or production of each particular package need not be stated on the label, except where, in the opinion of the Secretary of Agriculture, the mention of any such place, to the exclusion of the other, misleads the public."⁶ To brand salt "Granulated Liverpool Dairy Salt, Factory Filled, Manufactured by Inland Crystal Salt Co., Salt Lake City," with a stamp or branded picture of a crown above the label, with the words "Liverpool Dairy Salt" printed in large and more prominent letters than the other words in the brand, is to misbrand it, giving out the inference that it is salt from Liverpool, England.⁷ So it is to misbrand American rice to label it "Mikado No. 1, Fancy Japan Rice, Coated with Glucose and Talc, Removed by Washing Before Using."⁸ So California maple syrup as "Strictly Pure Canada Maple and White Sugar Blended Syrup."⁹ So flour labeled as manufactured in San Francisco, California, when it was manufactured in Oregon.¹⁰ So vanilla labeled "Gold Medal Pure Concentrated Compound Extract of Vanilla, Standard Extract Company, New York," when it was produced in Richmond, Virginia.¹¹ So to label syrup "George Bubb and Sons, Williamsport, Pa.," when it was made in Granite City, Illinois,¹² or cheese "Roquefort Cheese" when made in Illinois, for Roquefort cheese is a French production;¹³ or "English Dairy Cheese," when made in Connecticut,¹⁴ or "Fromage de Brie, Trade Mark Circle X Brand," when it was made in Illinois and not in France;¹⁵ or "Elgin Creamery Butter" when it was made in Pierceville, Indiana;¹⁶ or "Saint Louis" and "Bohemian Beer" when it was made in Brooklyn, New York;¹⁷ or "Original Holland

⁶ Regulation 18.

⁷ N. J. 280.

⁸ N. J. 190.

⁹ N. J. 99.

¹⁰ N. J. 443; N. J. 439.

¹¹ N. J. 532.

¹² N. J. 100.

¹³ N. J. 341.

¹⁴ N. J. 154.

¹⁵ N. J. 431.

¹⁶ N. J. 332; N. J. 351.

¹⁷ N. J. 51.

Rusk, made in Holland," when it was made in New York.¹⁸ "Trinacria Macaroni Works, Pasta Extra Sicilia," indicates that the macaroni thus labeled was made in Italy.¹⁹ So a bakery product made in Philadelphia labeled as made in Baltimore is mislabeled.²⁰

§ 279. Sugar in Canned Foods.

"Numerous inquiries have been addressed to the Department respecting the proper labeling of canned fruits and vegetables to which sugar has been added. Sugar is a wholesome food product, and is also condimental. It reveals its own presence by its taste. Its addition to a food product can not be objected to on the ground of injury to health.

"It is held by this Department that sugar can be used in the preparation of all food products where it is not used for fraudulent purposes. If sugar be added without notice to Indian corn which is not sweet, for the purpose of making it appear a sweet corn, to be sold as such, it is used for a fraudulent purpose, and for this reason is prohibited by the law.

"In section seven of the law it is provided that a food is adulterated 'if it be mixed, colored, powdered, coated or stained in a manner whereby damage or inferiority is concealed. It is evident, therefore, that a food product can not be mixed with any other substance for the purpose of concealing damage or inferiority. A vegetable which is not naturally sweet could not be sold as one which is naturally sweet by mixing with sugar without violation of the law, unless the addition of sugar is plainly indicated on the label.

"The addition of sugar to canned vegetables is not for preservative purposes. Added sugar increases the tendency to fermentation. It is added wholly as a condimental ingredient.

"It is held, therefore, that the addition of sugar to a substance not naturally sweet, converting it into a substance which might seem naturally sweet, is justified if the label

¹⁸ N. J. 429.

²⁰ N. J. 954.

¹⁹ N. J. 804.

plainly indicates that this sweetening material is added. In other cases, where no deception is practiced, the mention of the presence of sugar is not required.

"The term 'sugar,' as used herein, is confined to sucrose (saccharose), either in a solid form or in solution."¹

§ 280.—Substances Used in the Preparation of Foods.

"The following letter was recently received at the Department of Agriculture:

"We import a preparation of gelatin preserved with sulphurous acid for the purpose of fining wine. This gelatin is not used as a food and does not remain in the wine, although a small amount of the sulphurous acid may be left in the wine. Please inform us if the sale of this product is a violation of the food law."

"It is held that the products commonly added to foods in their preparation are properly classed as foods and come within the scope of the Food and Drugs Act. The department can not follow a food product into consumption in order to determine the use to which it is put."¹

ART. II.—FOOD DECISIONS.

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- 281. Alcohol in food.
- 282. Alfalfa meal.
- 283. Apples.
- 284. Apple butter—glucose.
- 285. Beer.
- 285a. Benzoate of soda.
- 286. Bran.

SEC.

- 287. Brandy.
- 288. Buckwheat.
- 289. Butter.
- 290. Butterol, Concreta.
- 291. Cane syrup.
- 292. Caramels.
- 293. Cereal.

¹ F. I. D. 66.

¹ F. I. D. 48.

"The manufacturer, without violating any of the provisions of the statute against adulteration, may mix any number of constituents in his compound, so long as these constituents are not poisonous or deleterious to health and he gives the

compound a distinctive name and states where it is manufactured. The matter thus produced is 'the article of food' whose quality and strength the statute seeks to preserve, and the nature of the product in these respects is fixed and determined by the elements which enter into it." N. J. 990.

SEC.

- 294. Cerecut.
- 295. Cheese.
- 296. Cherry syrup.
- 297. Chicken feed.
- 297a. Chocolate cremolin.
- 298. Cider.
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- 300. Cocoa and chocolate.
- 301. Cocoa butter substitutes.
- 302. Cod liver oil compound.
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- 306. Coffee, imitation—Cereal coffee.
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- 310. Corn meal.
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- 330. Flavoring extracts.
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- 334. Fruit syrups.
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- 340. "Hen—E—Ta Bone Grits."
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- 345. Kola syrup.
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- 350. Meal.
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- 354a. Olives.
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- 358. Pepper.
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- 364. Rice, polishing and coating.
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380. Water.	

§ 281. Alcohol in Food.

The amount of alcohol in food need not be stated. However, extracts that are sold and used for medicinal purposes must have the percentage of alcohol stated on the label.¹

§ 282. Alfalfa Meal.

A meal the label upon which states it contains 15 percent of protein and 22 percent of fiber is mislabeled where it contains only 11.94 percent of protein and 31.96 percent of fiber.¹

§ 283. Apples.

Apples labeled as packed in Michigan and as Michigan apples are mislabeled when they are grown and packed in Arkansas. "It is immaterial," said the court, "whether Michigan fruits are better than those grown in Arkansas. A purchaser of fruits may prefer Michigan fruits. He may believe them to be better than Arkansas fruits. He has the right to call for them, and when he pays or is debited for them he has the right to have Michigan fruits. The purchaser has the right to determine for himself which he will

¹ F. I. D. 47.

¹ F. I. D. 608.

buy and which he will receive and which he will eat. The vendor can not determine that for the purchaser. He, of course, can make his argument, but they should be fair and honest arguments."¹ Apples labeled as "choice evaporated apples" are mislabeled if they are rotten and moldy in part, have worms, seeds and general apple waste.²

§ 284. Apple Butter—Glucose.

Under the label stating that the apple butter contained in the can is "absolutely pure," the use of 6.13 percent of glucose in the butter is an adulteration, and the can is misbranded.¹

§ 285. Beer—Cream Ale.

Beer labeled as manufactured in St. Louis and as "Bohemian" beer when it was manufactured in Brooklyn and is not Bohemian beer, is misbranded.¹ A beer having a greater percentage of alcohol than the label indicates is mislabeled.² A product was labeled "Temperine Special Brew, the great Temperance Drink," and another "The Great Temperance Beer; Laevison's Original Cream Ale Special Brew." They each contained four percent of alcohol. It was adjudged that they were mislabeled.³

§ 285a. Benzoate of Soda.

If a label, pretending to give the ingredients of a product, fails to state that it contains benzoate of soda, when such is the fact, it is mislabeled.⁴

§ 286. Bran.

An article marked "Bran" is mislabeled if it contains rice hulls.¹

¹ N. J. 36.

² N. J. 519; N. J. 255; N. J. 457; N. J. 161; N. J. 949; N. J. 976; N. J. 978; N. J. 934.

¹ N. J. 702.

¹ N. J. 51.

² N. J. 65.

³ N. J. 834.

⁴ N. J. 999.

¹ N. J. 231. See §§ 328, 374.

§ 287. Brandy.

To label imitation brandy as brandy is a violation of the statute.¹

§ 288. Buckwheat.

A flour labeled "Buckwheat Flour" is mislabeled if wheat flour has been mixed with it;¹ so if graham flour be mixed with it;² so if corn flour or meal be mixed with it.³

§ 289. Butter.

Butter labeled as made in New Orleans when it was manufactured in Chicago is mislabeled.¹ So is butter labeled as "Elgin," Illinois, when it was not made there.² But inasmuch as a statute of 1886³ permits butter to be colored, it is not a violation of the Pure Food and Drugs Act if it be colored; and the fact that it is colored need not be stated on the label.⁴ To label renovated butter "Gold Seal Warranted Pure, Fine Fresh Butter," is to misbrand it;⁵ and the charge of misbranding is not lessened by putting on the sides of the packages "Process Butter," where they are entirely hidden from view.⁶

§ 290. Butterol, Concreta.

A substance called "Concreta Butterol" labeled as follows:

1. "This product has the characteristics of rich creamery butter, both in taste and odor."
2. "Imparts the true butter flavor to your goods."
3. "It is absolutely pure and palatable . . ."
9. "Concreta Butterol tones up the quality of butter that has lost its refinement of taste, making it sweet and wholesome,"

¹ N. J. 413 (apricot brandy); N. J. 414 (peach brandy).

¹ N. J. 317; N. J. 129; N. J. 118; N. J. 60.

² N. J. 263.

³ N. J. 118; N. J. 60.

¹ N. J. 351.

² N. J. 332; N. J. 67; N. J. 42.

³ 24 U. S. Stat. at Large 209.

⁴ F. I. D. 51.

⁵ N. J. 713.

⁶ N. J. 1018.

is mislabeled unless it corresponds with all these representations.¹

§ 291. Cane Syrup.

A label which contains the statement that the can on which it is placed contains "Cane Syrup" is false if it contains an appreciable amount of glucose.¹ Where the label was as follows: "This syrup is composed of the following ingredients and none other, Cane Syrup 60 percent, and Maple Syrup 40 percent," whereas it contained little, if any, maple syrup, the label was considered to contain a false statement.² Syrup was labeled "Alaga Syrup, Alabama-Georgia Syrup Co., Montgomery, Ala.," together with a pictorial design of a bundle of sugar cane tied with streamer of ribbon bearing the words "Alabama-Georgia," and a scene showing the gathering of sugar cane from a field, together with the following legend: "Alaga—contents of this can is put up direct from the evaporator while hot. Guaranteed to retain its natural sweet flavor indefinitely," while on the sides of the label in small type was the following legend: "Alaga Brand Syrup is a blend of Pure Ribbon Cane Syrup, with just enough corn syrup to keep the same from sugaring or souring. Its merits is what tells." The syrup was composed of cane syrup and 28 percent glucose. It was held that it was misbranded.³ Upon a can of syrup was the following legend: "Wilder's Uniform Brand Syrup. Canned only by the D. R. Wilder Mfg. Co., Atlanta, Ga.," it being printed in a quadrangular space formed by an arrangement of the words "Georgia Cane," printed in capital letters, which were represented as being interwoven with cane stalks, and on the opposite side of the can appeared the following words, "Best in the World." "The Syrup that made Georgia famous," and on the side of the can in small type together with other descriptive matter, "This package contains eighty-five percent pure Georgia cane and fifteen per-

¹ N. J. 343.

² N. J. 271.

³ N. J. 324.

³ N. J. 127.

cent pure corn syrup which is added to prevent granulation." An analysis of a sample showed the following result:

Solids (percent)	71.00
Polarization, direct, at 25° C. (°V.)	+76.9
Polarization, invert, at 25° C. (°V.)	+36.4
Polarization, invert, at 87° C. (°V.)	+48.4
Sucrose (Clerget) (percent)	31.1
Glucose (87° C. 163) (percent)	29.7
Ash (percent)	0.82

This was held to show that the syrup was misbranded within the meaning of the law, because labeled to show that it was Georgia Cane Syrup, whereas it was a mixture of cane syrup and glucose, and the statements in the label, "Georgia Cane," "Best in the World," and "The syrup that made Georgia famous," were false and misleading.⁴

§ 292. Caramels.

"The Department is in receipt of the following inquiries from manufacturers of confectionery:

'1. Milk Caramel.—This piece contains no milk, but is composed principally of sugar and glucose, and we would like very much to know if milk were added to this formula whether we could still continue to call it "Milk Caramel."

'2. Peaches and cream caramel.—This piece is made up principally of sugar and glucose and milk, and flavored with peach flavor. As there are 50 pounds of milk to a batch of 116 pounds, would this be considered as one of the principal ingredients?

'3. Whipped cream caramel.—This piece does not contain any cream or milk, but is made up principally of sugar and glucose. The batch is, however, whipped, and if we should add milk to it, would it be misbranded to continue to call it "Whipped Cream Caramel?"

"Section eight of the Food and Drugs Act of June 30, 1906, provides that any article of food is misbranded (1) if it be an imitation of or offered for sale under the distinctive name of another article; (2) if it be labeled so as to deceive or mislead the purchaser; (3) if the package containing it or

⁴ N. J. 106.

its label shall bear any statement, design, or device regarding the ingredients or the substance contained therein, which statement, design, or device, shall be false or misleading in any particular."

"These portions of section eight bear directly on the above as concerning the labeling of different types of caramels. Caramel No. 1 would be distinctly a case of misbranding, since it contains no milk.

"In regard to caramel No. 2, it is evident that if milk is used in that product, it is false and misleading to call it 'Cream Caramel.' It is thought that this product would be properly labeled as 'Peach-flavored Caramel' or 'Caramel, Peach Flavor,' if the peach flavor is not produced by the use of an imitation product. If an imitation peach flavor is used, the caramel could be properly branded only as 'Imitation Peach-flavored Caramel' or preferably, 'Caramel, Imitation Peach Flavor.' The question as to whether the 50 pounds of milk used to a batch of 116 pounds forms one of the principal ingredients would have to be determined by the proportion of the ingredient found in the finished article. This question, however, is immaterial in considering the question as to whether the name 'Cream' can be applied to the caramel.

"To caramel No. 3 the above statements apply equally well. Since it does not contain any cream, the label 'Whipped Cream Caramel' would be false and misleading. Even if milk were added to the batch and the whole were whipped, the product would not be entitled to bear the label 'Whipped Cream Caramel'."¹

§ 293. Cereal.

A cereal food was labeled as follows: "Nivara Cereal food. Nivara is made from rice, wheat and barley malt, no sweetening or shortening. A wonderful property of Nivara is that it helps to digest other foods. It is a rich, concentrated food." An analysis of it showed the following results:

¹ F. I. D. 81.

Water (percent)	3.78
Ash (percent)	1.70
Fat (percent)11
Protein (percent)	12.31
Crude fiber (percent).....	1.07
Carbohydrates by difference (percent).....	81.03
Fuel value (calories per gram).....	3,977.72

It was evident that the article was not a rich, concentrated food, and had not the property of assisting in the digestion of other foods, and was therefore misbranded within the meaning of section eight of the Act, because the statements on the label that "Nivara is a rich, concentrated food" and "a wonderful property of Nivara is that it helps to digest other foods" were false, misleading and deceptive.¹

§ 294. Cerecut.

A product was labeled as follows:

"For drawback, minimum fat eight percent, minimum protein fifteen percent, maximum crude fiber fifteen and five-tenths percent. Average water eight percent, starch, sugar, etc., forty-nine percent. Sterilized cerecut, one hundred pounds net. Ground from the whole grain, wheat, oats, buckwheat and flax screenings. The Millers' Products Co., Chicago, Ill., U. S. A. Made in Minneapolis, Minn. Guaranteed under the Food and Drugs Act, June 30, 1906, 17115."

The product contained no oats or buckwheat. It was held that it was mislabeled.¹

§ 295. Cheese.

Cheese labeled "Fromage de Brie, Trademark Circle X Brand" is mislabeled if a domestic cheese.¹ Cheese labeled

¹ N. J. 96; N. J. 105. "Fig-prune Cereal" has been condemned. N. J. 975.

It may now be well doubted if these decisions are sound, since the decision of the United States Supreme Court holding that the statute does not apply to instances of

statements placed on medicines concerning their curative properties. United States v. Johnson, — U. S. —, 31 Sup. Ct. 627, — L. Ed. —. See § 405.

¹ N. J. 298.

¹ N. J. 431.

"English Dairy Cheese" is mislabeled if a domestic cheese.² Cheese labeled "Neufchatel Style Cheese" is mislabeled if made of skimmed milk; and it is also mislabeled if the word "Style," is in so small and inconspicuous type as to deceive and mislead the purchaser into believing it to be a foreign product of a well-known superior quality.³ A cottage cheese can not be labeled "Neufchatel cheese."⁴ The use of the words "Neufchatel Cheese" on cheese shows it to be a foreign cheese.⁵ So the use of the word "Roquefort" on cheese implies that it was made in Roquefort, France.⁶ Cheese labeled "Cream Cheese" which is made from skimmed milk is mislabeled.⁷ Cheese by statute may be colored,⁸ and it is not a violation of the Pure Food and Drugs Act to do so.⁹ A domestic cheese labeled "Leider Tafel Specialitaet. Dieser dessert Kase ist mit der groessten Sorgfalt angefertigt," is misbranded.¹⁰

§ 296. Cherry Syrup.

To label a syrup to be used as the basis for a drink as "Red Tame Cherry" is to hold out to the public that the syrup is prepared from cherries; but if it contains only a "trace" of fruit, and is colored with coal tar dye, it is mislabeled.¹ To label a product "Maraschino Cherries" when it contains no Maraschino is a violation of the statute.²

§ 297. Chicken Feed.

A sack of chicken feed which contains only 2.56 percent fat and 18.7 percent crude fiber is mislabeled under the following label: "Guar. Analysis Protein (6.25 times nitrogen) 12 percent, Fat 3.5 percent, Fiber 12 percent."¹

² N. J. 154.

³ N. J. 291; N. J. 562; N. J. 576.

"Mohawk Brand." N. J. 851.

⁴ N. J. 566.

⁵ N. J. 576.

⁶ N. J. 341.

⁷ N. J. 344; N. J. 980.

⁸ 29 U. S. Stat. at Large 253.

See Appendix.

⁹ F. I. D. 51. Soaked curd. See F. I. D. 97.

¹⁰ N. J. 870.

¹ N. J. 372; N. J. 549.

² N. J. 912.

³ N. J. 404; N. J. 729.

§ 297a. Chocolate Cremolin.

A product purporting to be "Chocolate Cremolin," containing "powdered cocoa and a little harmless coloring" is misbranded if it contains 5.96 percent of ferric oxide and twelve parts of arsenic per million.²

§ 298. Cider.

A liquid labeled "Red Refined Cider," which contains saccharine, benzoic acid, dye and water, is mislabeled.¹ A liquid can not be labeled "Apple Cider" where the analysis of it shows the following result:

Alcohol by volume (percent).....	11.93
Solids (percent)	3.82
Polarization (degrees Ventzke).....	4.0
Reducing sugar after inversion (percent).....	1.28
Sucrose	0.00
Ash (percent)	0.277
Benzoic or salicylic acid	None
30.9 cc N/10 NaOH for 100 cc of cider.	
Alkalinity of ash.....	
Phosphoric acid, P_2O_5 (percent).....	0.019*

A liquid labeled "Apple Cider" is mislabeled if it contains even one-tenth of one percent of benzoate of soda.³

§ 298a. Cloves.

A product labeled "Pure Powd. Cloves" is misbranded if it contains allspice tissue and a small amount of exhausted cloves.¹

§ 299. Coca Cream and Pepsette.

A product was labeled "Great American Coca Cream. A carbonated beverage artificially colored and flavored." Another was labeled "Great American Pepsette. A pepsin and fruit drink for indigestion, heartburn, etc. A carbonated

* N. J. 989.

* N. J. 6.

* N. J. 615.

* N. J. 888.

* N. J. 1.

beverage artificially colored and flavored." The coca cream was found to contain saccharine, benzoic acid, cocaine and caffeine; and the pepsette none of the proteolytic activity of pepsin and to contain cocaine. It was held that both products were adulterated and misbranded.¹ The criminal information in this case was substantially as follows:

"That the pepsette contained in the aforesaid shipment of April 29, 1909, was adulterated in that said bottles contained a dilute solution of sugar, colored and flavored; that it contained no pepsin; in that the said product contained cocaine, an added poisonous and deleterious ingredient which rendered said article injurious to health, and that it was artificially colored whereby its inferiority was concealed; and further alleging the product to be misbranded in that the contents of said bottles consisted of a dilute solution of sugar artificially colored and flavored and contained no pepsin; that it contained cocaine, and the label upon said bottles failed to declare the quantity and proportion of cocaine contained therein, or that said bottles contained any cocaine; in that the said bottles did not contain a pepsin and fruit drink; and that the contents of said bottles contained no pepsin; in that said bottles were so labeled as to deceive and mislead the purchaser, and that the labels upon said bottles were false and misleading; and alleging that the coca cream so shipped was adulterated in that the said jugs contained a product with which had been mixed cocaine, saccharine, benzoic acid, and a coal tar dye, so as to injuriously affect its quality, and in that the contents of said jugs contained added poisonous and deleterious ingredients, to wit, cocaine, caffeine, and a harmful coal tar dye, which rendered the said article injurious to health, and further alleging the product to be misbranded in that the said jugs contained a product which had been mixed with cocaine, saccharine, and benzoic acid and a coal tar dye, so as to injuriously affect its quality; and in that the label of said jugs failed to declare the quantity and proportion of cocaine contained therein or that

¹ N. J. 742.

said jugs contained cocaine; and that the labels upon said jugs were false and misleading in that said jugs were so labeled as to deceive and mislead the purchaser, that said product contained in said jugs was not a coca cream, but was in fact a mixture of coca cream, cocaine, benzoic acid, and coal tar dye. The information also alleged that the pepsette contained in the aforesaid shipment of April 28, 1909, was adulterated in that said bottles contained a dilute solution of sugar, colored and flavored; in that it did not contain either pepsin or fruit; and that it did contain cocaine; and that said product contained an added poisonous and deleterious ingredient which rendered said article injurious to health, to wit, cocaine; and that it was artificially colored whereby its inferiority was concealed; and that the product was misbranded in that said bottles contained a dilute solution of sugar colored and flavored; that it did not contain either pepsin or fruit; that said product did contain cocaine; that said label failed to declare the quantity and proportion of cocaine contained therein, or that said product contained any cocaine; that said product contained an added poisonous and deleterious ingredient which rendered said article injurious to health, to wit, cocaine; that it was artificially colored whereby its inferiority was concealed; and that said label was false and misleading."

A product was labeled "Great American Coca Cream. A carbonated beverage artificially colored and flavored." On analysis it was found to contain caffeine, cocaine, saccharine and benzoic acid. It was held mislabeled because it did not show these elements.²

§ 300. Cocoa and Chocolate.

"The Board of Food and Drug Inspection has had under consideration for some time the question of the propriety of the use of the term "Caracas" as applied to cocoa coming from South America. Valuable information has been obtained through the Department of State in the form of a dispatch from the American consul at La Guaira, Venezuela,

² N. J. 741.

under date of September 30, 1909. In reply to a request from the Secretary of State for a report on the cocoa of Venezuela and its proper designation, the American consul states as follows:

'In reply thereto I am informed that the term "Caracas cocoa" or "Caracas cacao" should properly, according to its original usage, be applied only to cacaos exported through the port of La Guaira, but through the extension of the industry and similarity of product it has become corrupted so as to cover all "current" or "ordinary" cacaos of Venezuela, including those coming from Rio Chico, Rio Caribe, Guiria, Carupano, and Higuerote. This has come about because of the parallel quality of these cacaos with those of the so-called "Caracas" district.

'There are three Venezuelan districts usually found in current quotations of cacaos: Angostura, being the cacaos coming out of the lower Orinoco basin through Ciudad Bolivar; Caracas, those mentioned above; Maracaibo, those cacaos being exported through Maracaibo. Exports from La Guaira and Puerto Cabello, with the exception of perhaps 10,000 bags (mentioned below) cover only such cacaos as are generally known as "current," and therefore classified by importers in the United States as "Caracas."

'There are some small districts lying between La Guaira and Puerto Cabello, known as Choroni, Ocumare, Cepe, and Chuao, turning out about 10,000 bags annually of a very high grade of cocoa, but this virtually all goes to Europe, principally to Paris, and is therefore not quoted in the ordinary "brokers" cocoa reports.

'The cacaos from Carupano, Rio Caribe, and Higuerote are said to be of the same grade as these two latter. The Angosturas may be more or less a cent better in grade than the samples of "Caracas" sent herewith.

'From what I can learn of the cacao situation I think the name "Caracas" has gotten to be more of a designation of the current class of Venezuelan cacao than to indicate the district of its production, and under the circumstances it seems the term has taken on the broader meaning suggested in the letter of the Secretary of Agriculture of August 30, 1909. To further indicate that this is true I beg to inclose a "Broker's cocoa report," from a New York commission house, wherein no other Venezuelan districts are named than Angostura, Caracas, and Maracaibo.'

"In House Documents, volume 65, serial 4844, Fifty-eighth Congress, page 155, is the following:

'The cacao of Venezuela also finds a ready sale in the United States, in the markets of which it is known, like coffee, by the name of "Caracas"

and "Maracaibo," the former embracing the cacao coming from Rio Caribe, Guiria, Carupano, Rio Chico, Higuerote, and other places on the eastern coast; the other grade comes from the States of Zulia, Merida, Trujillo, and Tachira.'

"This corresponds entirely with the views expressed by our consul at La Guaira.

"After a consideration of this question, the board is of the opinion that the term "Caracas" is properly applied to the area mentioned in the above quotation from House Document, Volume 65."¹

"After consideration of the evidence submitted in regard to the meaning of the terms 'chocolate' and 'cocoa,' the Board of Food and Drug Inspection has reached the conclusion that the definitions laid down in the 'Standards of Purity for Food Products,' adopted by the Committee on Food Standards, Association of Official Agricultural Chemists, and printed in Circular No. 19, Office of the Secretary of Agriculture, are substantially correct. By these definitions the names 'chocolate,' 'plain chocolate,' 'bitter chocolate,' 'chocolate liquor,' and 'bitter chocolate coatings,' are applied to the solid or plastic mass obtained by grinding cocoa nibs without the removal of fat or other constituents except the germ, containing not more than three (3) percent of ash insoluble in water, three and 50 hundredths (3.50) percent of crude fiber, and nine (9) percent of starch, and not less than forty-five (45) percent of cocoa fat.

" 'Sweet chocolate' and 'sweet chocolate coatings' are terms applied to chocolate mixed with sugar (sucrose), with or without the addition of cocoa butter, spices, or other flavoring materials, and contain in the sugar and fat-free residue no higher percentage of either ash, fiber or starch than is found in the sugar and fat-free residue of chocolate.

"Cocoa, and powdered cocoa, are terms applied to cocoa nibs, with or without the germ, deprived of a portion of its fat and finely pulverized, and contain percentages of ash, crude fiber, and starch corresponding to those in chocolate after correction for fat removed.

¹ F. I. D. 114.

"Sweet cocoa, and sweetened cocoa, are terms applied to cocoa mixed with sugar (sucrose), and contain not more than sixty (60) percent of sugar (sucrose), and in the sugar and fat-free residue no higher percentage of either ash, crude fiber or starch than is found in the sugar and fat-free residue of chocolate.

"Cocoa nibs, and cracked cocoa, are the roasted broken seeds of the cacao tree freed from shell or husk.

"Milk chocolate and milk cocoa, in the opinion of the Board, should contain not less than 12 percent of milk solids, and the so-called nut chocolates should contain substantial quantities of nuts. If sugar is added, for example, to milk chocolate, it should be labeled 'sweet milk chocolate,' 'sweet nut chocolate,' etc.

"When cocoa is treated with an alkali or an alkaline salt, as in the so-called Dutch process, and the finished cocoa contains increased mineral matter as the result of this treatment, but no alkali as such is present, the label should bear a statement to the effect that the cocoa contains added mineral ingredients, stating the amount. Cocoas and chocolates containing an appreciable amount of free alkali are adulterated. In the opinion of the Board, cocoa not treated with alkali is not soluble in the ordinary acceptance of the term. Cocoa before and after treatment with alkali shows essentially the same lack of solubility. To designate the alkali-treated cocoa as 'soluble' cocoa is misleading and deceptive."²

If in the preparation of cocoas alkali or any other substance may be employed in order to increase the apparent solubility of the product, the label placed upon it should have upon it a declaration to that effect. "Prepared with alkali" or "manufactured with alkali" is sufficient. A substance purporting to contain "powdered cocoa and a little harmless coloring" is adulterated if it contains 5.96 percent of ferric oxide and twelve parts of arsenic per million.³

² F. I. D. 136.

³ N. J. 989.

§ 301. Cocoa Butter Substitutes."

"A manufacturer writes:

"We use in the preparation of chocolate sticks a guaranteed pure production of cocoanut oil. May this production be sold merely as confectionery, and not as chocolate sticks? If not, would it be satisfactory for us to mark the product as "Chocolate sticks prepared with substitute butter?"

"Regulation 22 prohibits the sale, or offer for sale, in interstate or foreign commerce or in the District of Columbia or in any Territory of the United States, of a food or drug product which bears no label whatever if said product be an imitation of or offered for sale under the name of another article. It would clearly be a violation of the law to sell an article which was made in imitation of chocolate, even though it sold under the general name of a confection. Such an article should be labeled in such manner as to correctly represent its true nature.

"Regulation 25 (a) provides:

"When a substance of a recognized quality commonly used in the preparation of a food or drug product is replaced by another substance not injurious or deleterious to health, the name of the substituted substance shall appear upon the label."

"It is held that cocoa butter is the only fat that can properly be used in chocolate. The declaration of foreign fats merely as 'substitute butter' is apparently not sufficient; the nature of the fat employed should be stated."¹

§ 302. Cod Liver Oil Compound.

A liquid was labeled "Metabolized Cod Liver Oil Compound;" "Waterbury's Metabolized Cod Liver Oil Compound does contain Cod Liver Oil." "Many of these [institutions] are using it exclusively as the one general tonic and tissue builder;" "Blue wrapper indicates product without antiseptic." It contained no material part derived from cod liver oil due to metabolic changes. It could not be used

¹ F. I. D. 61.

as a tissue builder, and was not such. It contained an antiseptic—salicylic acid—notwithstanding the statement on the blue wrapper that it did not. The court declared the liquid forfeited.¹

§ 303. Codfish.

To label codfish taken out of North American waters with the label "Prime Italian Codfish" is to violate the statute.¹

§ 304. Coffee.

To label a blend of South American and Dutch East Indian coffees as "Mocha and Java" is to misbrand them.¹ A product can not be labeled "Cereal Coffee," even if it consists in part of coffee.² A coffee was labeled as follows: "Climax Java Blend Coffee" and "Climax Package Coffee, a Combination of High Grade Old Crop Coffee of Scientific Blending." It consisted exclusively of a low-grade Rio coffee, no Java coffee being present, nor could any "scientific blending" be traced. It was held that the labels were false.³ Coffee labeled as "Mocha and Java Blend" is mislabeled where Maracaibo or Santos coffee has been in part substituted for the Mocha and Java.⁴ A substance labeled "coffee" is mislabeled if it contains chicory.⁵ A package of coffee was labeled as follows: "One Pound Net Weight Blanke Coffee Company Dutch Moka. A Bourbon Blend Select Roasted Coffee," and on the fourth side thereof, in small type, "This has no reference to Arabian Mocha but as the name implies, is a perfectly balanced combination of fine old mellow varieties with choice Bourbon Santos, which means Mocha Coffee transplanted in Santos, producing a cup at once rich, smooth and satisfying." The coffee was a Santos coffee.

¹ N. J. 303.

² N. J. 778.

³ N. J. 677; N. J. 547; N. J. 355;
N. J. 1014.

⁴ F. I. D. 50.

⁵ N. J. 55.

⁴ N. J. 215; N. J. 896; N. J.
951; N. J. 841; N. J. 981; N. J.
1014.

⁵ N. J. 177; N. J. 407; N. J.
530; N. J. 714.

fee, and it was held that it was mislabeled.⁶ To label Santos coffee or "Old Government" coffee is to violate the statute; for the term "Old Government" applies exclusively to a coffee produced on the island of Java, and not to a Santos coffee.⁷ Coffee was labeled in Greek, of which the following are translations:

"Leva Brothers. Leva Brothers' Mustapha Turkish Coffee. Genuine Mocha Coffee is ground by a special machine. Each box contains one pound of coffee, and the box is firmly tied, so that no air can get in to spoil the flavor of the coffee. Prepared by Leva Brothers, 36½ Oliver Street, New York."

and

"Leva Brothers' Genuine Turkish Coffee is ground by a special machine. Every box contains one pound of coffee, and the box is firmly tied, that no air can get in to spoil the flavor of the coffee. Prepared by Leva Brothers, 36½ Oliver St., New York, N. Y."

The coffee was a low grade Santos coffee, and it was held to be misbranded.⁸

Coffee was labeled as follows:

On front of carton—

"One Pound Net weight Blanke Coffee Co. Dutch Moka A Bourbon Blend Select Roasted Coffee;"

On back of carton—

"Dutch Moka A Bourbon Blend Coffee This has no reference to Arabian Mocha but as the name implies, is a perfectly balanced combination of fine old mellow varieties with choice Bourbon Santos, which means Mocha Coffee transplanted in Santos;"

"Blanke's Grant Cabin Blend Coffee Combination of Mocha, Java, and other Superior Grades C. F. Blanke Tea & Coffee Co., St. Louis, Mo."

The coffee was a South American coffee, and it was held to be misbranded.⁹

Upon the label of a coffee package was printed the following:

"Refined Coffee, Digesto Brand. This high-grade coffee is the only

⁶ N. J. 387.

⁷ N. J. 611.

⁸ N. J. 371.

⁹ N. J. 275.

really refined coffee known. The excess of both caffeine and caffetannic acid has been removed. Consequently, its flavor is better than other coffee, because this bitterness and acidity have been extracted. Does ordinary coffee hurt you? Many people can not drink unrefined coffee because it contains the irritating poisons, caffeine and tannic acid. They produce—headache, wakefulness, palpitation of the heart, nervousness, nervous dyspepsia, indigestion, biliousness, languid feeling, heartburn, depression of spirits, irritability, tremulousness, caffeinism. (See Century Dictionary.) Why refined coffee will not hurt you: The excess of irritating bitter poison is taken out of this coffee. It is refined by both mechanical and chemical processes.

A sample of the coffee was obtained, and on analysis the results given below were obtained. At the same time an analysis of a sample of ordinary roasted coffee purchased on the open market was made and these which are given for comparison:

Analysis of "Digesto" and of ordinary coffee.

Determination.	"Digesto" Coffee.	Ordinary Roasted Coffee.
Water (percent)	2.23	3.19
Ash (percent)	4.23	3.92
Alkalinity of ash (cc of normal acid per 100 grams of material)	48.2	48.4
Fat (percent)	14.10	15.92
Proteids (Nx6.25) (percent)	12.43	13.50
Chloroform extract from alkaline solution of the water extract	1.24	1.30
Acidity (cc of normal alkali per 100 grams of ma- terial)	22.0	28.0
Caffetannic acid (percent)	10.88	10.67
Caffein (percent)	1.06	1.04

The statement upon the label was, therefore, false in these respects: It was claimed that the coffee, by reason of its purity, was the best in the world for flavor and aroma. It was represented that the excess of both caffein and caffetannic acid had been removed from the coffee, whereas in truth and in fact no portion of these substances had been so removed, unless by the removal of a portion of the substance of the coffee itself; that its flavor was better than any other coffee because bitterness and acidity had been extracted;

that the reduction of the bitter and acid elements left the coffee in a highly purified form; that the excess of irritating bitter poison had been left out of the coffee, and that it was refined by both mechanical and chemical processes; and that the manner in which the coffee was prepared permitted the real flavoring constituent—an aromatic oil—to be extracted easily by boiling.¹⁰

By putting a very small amount of Java Coffee in Santos coffee the mixture can not be labeled "Java Coffee."¹¹

"The term 'Java Coffee' has been abused for many years, hence it arises that both roasted and unroasted coffee, perchance ten times as much coffee is sold to the consumer, under the name of 'Java Coffee,' as is grown in Java.

"In conformance with the provisions of the pure food Act, all coffee coming from the island of Java might be called 'Java Coffee,' that from the Padang districts 'Padang Coffee,' that from Celebes 'Celebes Coffee,' and all other sorts from the Netherlands Indies 'Dutch East Indies Coffee.'

"In the Netherlands what is known as 'Java Coffee' is only the *Coffea arabica* produced in Java, so that the *Coffea liberica* coming from that island under the name of 'Java Coffee' falls as little under that term as all the coffee from the rest of the islands of the Indian archipelago.

The suggestions which are incorporated in this quotation from the American Minister at the Hague indicate a proper method of labeling coffee coming from the Dutch East Indies.

Coffee grown on the island of Sumatra would also be properly labeled if called "Sumatra Coffee," or, if desired, the label may state specifically and correctly the particular location in which the coffee in question was really grown.¹²

The following quotations are taken from the report submitted to the Department of State from the consular agent at Aden under date of January 3, 1908:

"The Mocha coffee is produced in that district of southern Arabia known as 'Yemen.' The latter is a strip of territory commencing at a point on the Red Sea a little north of the port of Hodeidah and extending first southeast to the Strait of Bab-el-Mandeb and then east nearly to Aden.

¹⁰ N. J. 4.

¹² F. I. D. 82.

¹¹ N. J. 355; N. J. 951; N. J. 841; N. J. 981; N. J. 896.

Yemen is, with the exception of a narrow fringe of land along the Red Sea and the Gulf of Aden, rugged and mountainous, embracing innumerable small, elevated valleys of high fertility which are irrigated by waters from the melting snows. This is the coffee district of Arabia.

"The term 'Mocha' was bestowed upon 'Yemen' coffee early in the last century, when Mocha was the port from which all Arabian coffee was shipped. The formation of huge sandbars in the Red Sea off Mocha, practically barring out all shipping, caused the port to be abandoned, and its trade went to Hodeidah and Aden, the bulk of it going to the latter place.

"All of the coffee raised in Yemen may properly be called 'Mocha' coffee, all coffee shipped from the port of Hodeidah comes within such classification. With regard to that exported from Aden, however, the case is somewhat different. There is a coffee grown in the upland regions of Abyssinia, in the vicinity of Harrar, which is known locally and to the coffee trade of the world as 'Longberry' or 'Harrar' in contrast with that of Mocha, which is sometimes called the 'Shortberry.' The colors of both coffees are practically the same, but the Abyssinian product has a raw, rank, leathery odor, while that of the berry grown in Arabia is delicate and agreeable. The Harrar berry is much longer than the Mocha one, besides being much less regular in form.

"While a considerable quantity of Abyssinian coffee is brought to Aden for shipment to Europe and to the United States, it is doubtful whether very little of it, if any, is exported as being Mocha coffee, the local merchants as a rule dealing in both grades of coffee and being very careful of the reputations of their houses. In Aden the only way in which a dishonest dealer might adulterate Mocha coffee would be by mixing it with the Abyssinian article. Such a proceeding would be at least but a clumsy fraud and would be readily and rapidly detected. It is safe to say that practically all of the coffee shipped directly from Hodeidah or Aden to the United States and labeled 'Mocha' are pure and unadulterated.

Consequently the term "Mocha" can be applied only to coffee grown in that part of Arabia to the north and west of Hodeidah, known as Yemen.¹³

A can was labeled "Mocha, Java and Mexican Coffee." On the label was the statement that "this can contains a combination of the three best coffees the world produces." The product was composed of one-half Mexican, one quarter Dutch East India, probably Padang, and one-quarter Longberry Mocha. It was adjudged that the coffee was misbranded with respect to the statement that it contained Mocha coffee.¹⁴ A coffee labeled as "Climax Package Cof-

¹³ F. I. D. 91.

¹⁴ N. J. 772; N. J. 841.

fee, a combination of high grade, old crop coffee of scientific blending," is mislabeled if it consist of inferior stock or ordinary stock.¹⁵

§ 305. Glazed Coffee.

"There have been frequent inquiries made regarding the application of the Food and Drugs Act to the practice of glazing coffee. The following is a type of the communications of this nature:

"It has been the custom with many roasters of coffee to use a finish, made out of supposedly harmless ingredients, on their coffees, especially the lower grades, the main object being to lessen the natural loss in weight during the process of roasting, and thus reduce the cost.

"We used a finish, ourselves, made up of lemon juice, flaxseed, gelatin, bicarbonate of soda, and lime water, until January 1, 1907, when we ceased, as we were uncertain as to its lawfulness under the pure food and drugs Act which went into effect that day. If it is against the law, we would ask that the pure food commission prepare a ruling on coffees, such as has been done on rice, and have this ruling take effect as soon as possible, as manufacturers who are adhering to this method of roasting are enabled to undersell those who are using the natural roast, thereby placing them at a decided disadvantage."

"Coffee is coated for one or all of the following reasons:

"1. To restore, at least in part, the loss of weight incident to roasting.

"2. To conceal damage or inferiority.

"3. To prevent the depreciation of the roasted coffee due to the escape of the aromatic constituents.

"4. To prevent the absorption of water which renders the roasted grains tough.

"It would appear that the questions involved in this practice are similar in many respects to those involved in the polishing and coating of rice, which is discussed in F. I. D. 67. As in the case of coating rice, it is the opinion of the department that no coating of any kind can be applied to the coffee 'if the product be mixed, colored, powdered, coated, or stained in any manner whereby damage or in-

¹⁵ N. J. 1017.

feriority is concealed.' In each case, whether or not such a result be secured is a question of fact to be decided by the evidence.

"It is held by the department that coffee treated in the manner indicated with lemon juice, flaxseed, gelatin, bicarbonate of soda, and lime water should be labeled in all cases with the name of the extraneous substances, as, 'coated with lemon juice, flaxseed, gelatin, bicarbonate of soda, and lime water.'

"In such declarations all of the substances used for coating should be mentioned. Any coloring matter or other substances that may be employed to change the tint of the coffee should be declared on the label."¹

§ 306. Coffee, Imitation—Cereal Coffee.

"A manufacturer wrote as follows: 'We beg to ask your opinion as regards the hyphenated word "Cereal-Coffee," and whether or not we are entitled to its use for a cereal substitute for coffee. . . . In our opinion the term "Cereal-Coffee" would come under the so-called trade name and distinctive name.' It is held that since the product mentioned is not coffee it can not properly be called by the term mentioned. Regulation 20 (d) provides that a distinctive name shall give no false indication of character. The use of the name 'Cereal-Coffee' might be taken to indicate that the product is coffee or has the properties of coffee, and hence the use of this term does not comply with the definition of distinctive name. Even if the product consist in part of coffee, the name would not be correct. It is suggested that products of this nature be designated as 'imitation coffee,' as provided in Regulation 21 (f). In such case the word 'imitation' should be in uniform type, or uniform background, and should be given equal prominence with the word 'coffee'.¹

¹ F. I. D. 80.

¹ F. I. D. 50.

**§ 307. Coffee, Importation—"Black Jack"—"Quakers"—
Coffee Screenings.**

"The department has recently investigated the sale and shipment within the jurisdiction of the Food and Drugs Act of June 30, 1906, of decomposed, imperfect and damaged coffee. A public hearing on this subject was held by the Board of Food and Drug Inspection on December 15, 1908, at which an opportunity to be heard was given to the trade and to the public. As a result of the investigations and the evidence adduced at the hearing, it is announced that the product ordinarily known as 'Black Jack,' consisting of rotten and decomposed berries, is regarded by the department as injurious to health and the Food and Drugs Act forbids its shipment or sale within the jurisdiction of said Act. Coffee which is damaged by water during shipment, or which has acquired a permanently offensive odor because of its proximity to hides or other materials of objectionable odor, is considered by the department to come within the phrase 'filthy, decomposed, or putrid,' within the meaning of that phrase as used in the Food and Drugs Act, and its shipment or sale as hereinbefore stated is, therefore, held to be forbidden. Immature berries, ordinarily known as 'Quakers,' are dead beans without pronounced smell or taste. They have not the characteristics of coffee, and, in the opinion of the department, their shipment or sale as coffee within the jurisdiction of the Act is in violation thereof. It is recognized that the ordinary coffees of commerce usually contain small quantities of these inhibited products, and no action will be taken in regard to the shipment or sale of the recognized graded coffees of commerce because of the small amount of these substances which may be present. In determining the present action of the department on any particular lot as to whether it contains more than the ordinary small quantities of the inhibited products, coffee graded as No. 8, on the New York Coffee Exchange, will be taken as a standard. Screenings consisting of inferior or broken berries, of stones, sticks, dirt, etc., should not be sold as coffee

even in a ground condition. This product should be designated as 'coffee screenings'."¹

§ 308. Copper Salts.

Vegetables may be greened with copper salts, but the salts must not contain an excessive amount of copper and be suitable for food, if the label bear the statement that sulphate of copper or other copper salts have been used to color them.¹

§ 309. Cordials.

"The term 'cordial' is usually applied to a product, the alcohol content of which is some type of a distilled spirit, commonly neutral spirits or brandy. To this is added sugar and some type of flavor. The flavor is sometimes derived directly by the addition of essential oils, again by the use of synthetic flavors, and also by the treatment of some vegetable product with the alcoholic spirit to extract the flavoring ingredients. It is likewise the general custom to color cordials. When a cordial is colored in such a way as to simulate the color of the fruit, flavor plant, etc., the name of which it bears, the legend 'Artificially Colored' in appropriate size type shall appear immediately beneath the name of the cordial, as is required by Regulation 17. Where the color used is not one which simulates the color of a natural product, the name of which is borne by the liqueur, then the legend as to the presence of artificial color need not be used. For example, creme de menthe which is artificially colored green should be labeled 'Artificially Colored.' On the contrary, chartreuse, either green or yellow, need bear no such legend for color.

"When the flavoring material is not derived in whole directly from a flower, fruit, plant, etc., the name of any such flower, fruit, plant, etc., should not be given to any cordial or liqueur unless the name is preceded by the word 'Imitation.'

¹ F. I. D. 108.

¹ F. I. D. 102. See § 235.

"The term cordial carries with it the significance of sugar (sucrose) as the sweetening agent. When anhydrous sugar (dextrose) is used, the label should bear a statement substantially as follows: 'Prepared with anhydrous sugar,' which statement should be made in a distinct fashion on the main label."¹ A preparation containing glucose, saccharin, benzoic acid and coal tar cannot be labeled "blackberry cordial."²

§ 310. Corn Meal.

Sacks of corn meal were labeled as follows: "Old Log Cabin Meal. Fresh Ground Corn Meal. Best Water Ground Style." This was held to indicate that the meal had been ground in a water mill on mill stones or buhrs; and as it was ground by the steam roller process, steam power being used, the meal was not correctly labeled.¹

§ 311. Corn Syrup and Sorghum Compound.

Labeling a can as "Corn Syrup and Sorghum Compound" in equal percentages when it contains 65.8 percent of commercial glucose is a misbranding of the article.¹ Corn syrup labeled as manufactured at Williamsport, Pa., which was made at Granite City, Illinois, is mislabeled.²

"We have each given careful consideration to the labeling, under the pure food law, of the thick, viscous syrup obtained by the incomplete hydrolysis of the starch of corn, and composed essentially of dextrose, maltose and dextrine.

"In our opinion it is lawful to label this syrup as 'Corn Syrup;' and if to the corn syrup there is added a small percentage of refiner's syrup, a product of the cane, the mixture, in our judgment, is not misbranded if labeled 'Corn Syrup with Cane Flavor'.³

§ 312. Cotton Seed Meal.

A cotton seed meal was labeled as follows: "Creamo Brand

¹ F. I. D. 125. See F. I. D. 92.

¹ N. J. 699.

² N. J. 926.

² N. J. 100.

³ N. J. 170.

³ F. I. D. 87.

Feed Meal. Guaranteed Analysis—Protein 22 percent, Fat 5 percent, Crude Fiber 28 percent.” An analysis showed 18.73 percent of protein, 4.69 percent fat, and 25.04 percent crude fiber, and approximately 50 percent cotton seed hulls. It was held that the article was mislabeled.¹

In another instance the label contained the legend that it was “Pure Cotton Seed Meal, 100 pounds. Guaranteed analysis not less than Ammonia 8 percent, Protein 41 percent, Nitrogen 6.50 percent, Crude Fat and Oil 9 percent.” The percentage of crude fat and oil was only 7.61 percent. It was held that the product was mislabeled.² A product was labeled: “Guaranteed Analysis: Protein 22 percent, Fat 5 percent, Crude Fiber 28 percent, 1909.” On analysis it was found it contained moisture 7.79 percent, ether extract 4.69 percent, protein 18.73 percent, and crude fiber 25.04 percent. It was held to be mislabeled as to the protein.³ Another product was labeled: “Guaranteed Analysis: Protein (6.25 times nitrogen) 25.00 (equivalent to Ammonia 4.50 percent), Starch and Sugar 15.00, Fat 5.00, Crude Fiber 28.00. This meal is made from decorticated Cotton Seed.” An analysis showed that it contained moisture 9.31 percent, ether extract 4.50 percent, protein 19.57 percent, crude fiber 22.72 percent, reducing sugar 0.07 percent, sucrose 2.60 percent, starch 1.36 percent (sugars and starch 4.03 percent), and about 50 percent hulls.” It was held that the product was mislabeled both as to the protein and hulls.⁴ Where the product was labeled “25 percent protein,” but it only contained 24.01 percent, it was adjudged mislabeled.⁵ The label was as follows: “Guaranteed Analysis: Ammonia not under 8 percent, Nitrogen not under 6½ percent, Protein not under 41 percent, Oil and Fat not under 9 percent, Crude Fiber 7 percent. J. Lindsay Wells Co., Memphis, Tenn., guarantees this Star Brand Cotton Seed Meal to contain not less than 9 percent of Crude Fat, 41 percent of Protein, and to be compounded from the following ingredients: Cotton Seed Prod-

¹ N. J. 179.

⁴ N. J. 756.

² N. J. 173.

⁵ N. J. 757.

³ N. J. 755.

uct . . .” It was found to contain 9.87 percent moisture, 6.93 percent ether extract, 39.88 percent protein, and 11.05 percent crude fiber. This was adjudged misbranded both as to the crude fat and fiber.⁶

§ 313. Cream-X-Cel-O.

A vegetable ice cream powder termed “Cream-X-Cel-O,” was labeled as follows: “Contains a high percentage of cream and butter fat.” The article did not contain a “high” percentage of cream and butter fat, but did contain a low percentage. It was considered that it was mislabeled.¹

§ 313a. Crown Glossine.

A product was labeled “Crown Glossine, with Chocolate Flavor and harmless color.” It contained 27 parts per million of arsenic. It was held to be mislabeled.¹

§ 314. Curacao.

A liquor was labeled as follows:

“Curacao La Forge Fils & Cie., Liqueur Superfine A. De Claremont Compagnie Concessionnaires.” “Compounded and distributed by A. De Claremont Co., New York, N. Y.” “Cette Liqueur a été préparée avec des matières premières absolument pures et de qualité irréprochable. Elle se recommande comme digestif hygiénique des plus agréables. La Forge Fils & Cie.”

It was manufactured in this country. It was adjudged to be mislabeled, in that the label held out the inference that it was made in France.¹

§ 315. Custard.

An article labeled “Custard” is mislabeled if cornstarch be substituted for eggs.¹

⁶ N. J. 758; N. J. 794; N. J. 798.

¹ N. J. 746.

¹ N. J. 402.

¹ N. J. 166.

¹ N. J. 972.

§ 316. Eggs.

To label eggs as 'pure and wholesome' when they are in part of a filthy, decomposed and putrid animal substance is to mislabel them.¹ A substance labeled "Egg Noodles" or "Egg Macaroni" is mislabeled if it contains little or no egg material; for such a label indicates that the principal ingredient of such a food is egg.² To brand a case of eggs as "Fresh Eggs" when they are not is to violate the statute.³ Eggs marked "A No. 933" are misbranded if they are in whole or in part filthy, decomposed, and in a moldy condition and unfit for food.⁴ A product labeled "Eg Nutrine, Whole Egg Substitute," and "1 lb. Eg Nutrine dissolved in one gallon of water compares in working properties to one gallon or seven or eight dozen fresh eggs;" and which consists of cornstarch, gum tragacanth and considerable proteid substances, and which contains water 6.89 percent, proteids 3.40 percent, fat 0.14 percent, ash 0.76 percent, lecithin P₂ O₅, 0.0064 percent, carbohydrates by difference 88.81 percent, sucrose 30.78 percent, is misbranded.⁵

§ 317. Extract of Banana.

A liquid labeled "Pure Concentrated Extract of Banana" is mislabeled if it be not an extract of banana, but a mere imitation of banana flavor.¹

§ 318. Extract of Lemon.

A liquid was labeled as follows:

[On Carton.]

"King B Concentrated Extract of Pure, Imitation, Lemon. From the Laboratory of Ullmann, Dreifus & Co., Cincinnati, Ohio. For Flavoring ice cream, soda water, custard, cakes, jellies, confections, etc. The delicious flavor possessed by King B Concentrated Extract is due to the excellence of the materials used, and to the great care with which they are prepared."

¹ N. J. 675.

⁴ N. J. 295; N. J. 272.

² N. J. 652.

⁵ N. J. 991. See also N. J. 969.

³ N. J. 7; N. J. 22.

¹ N. J. 405.

[On Bottle.]

"King B Compound citrol and lemon, Colored, manufactured by Ullmann, Dreifus & Co., Cincinnati, O."

This liquid was adulterated, in that a dilute solution of alcohol was substituted wholly or in part for lemon flavor; the article did not contain any oil of lemon, and not more than a trace of citrol derived from the oil of lemon, and was not even an "imitation" extract of lemon because of the substances enumerated. This was held to be a misbranding and a false label.¹ A product labeled "Terpeneless Lemon Flavor" which contains 0.08 percent citrol and an artificial coloring is mislabeled.² To label a product as "Strictly Pure Flavoring Extract of Lemon. Color Simulated," is to mislabel it if it contains dilute extract of lemon.³ A representation that a liquid contains lemon oil when it does not is a mislabeling.⁴ Lemon extract is the flavoring extract prepared from oil of lemon or from lemon peel, or both, and contains not less than 5 percent by volume of lemon oil. Therefore, any substance labeled "Extract of Lemon" that does not contain this percentage is mislabeled.⁵ A substance labeled "Extract of Lemon" which contains methyl alcohol is mislabeled;⁶ so is one colored with coal tar dye.⁷ "A great deal of testimony has been offered here," said the court in its charge to the jury in one case, "as to whether the words 'lemon extract' and 'lemon flavor' are used in the trade as synonymous terms. . . . It is for you to determine from the evidence whether or not the terms 'lemon flavor,' and 'lemon extract' are synonymous and mean one and the same thing. The contention of the government is that 'lemon ex-

¹ N. J. 689; N. J. 684; N. J. 637; N. J. 774; N. J. 918; N. J. 966; N. J. 1029.

² N. J. 662; N. J. 661; N. J. 660; N. J. 141; F. I. D. 444.

³ N. J. 644.

⁴ N. J. 56; N. J. 91; N. J. 136; N. J. 149; N. J. 237; N. J. 259; N. J. 536; N. J. 774.

⁵ N. J. 115; N. J. 147; N. J. 152; N. J. 277; N. J. 281; N. J. 313; N. J. 339; N. J. 411; N. J. 444; N. J. 601; N. J. 774; N. J. 823.

⁶ N. J. 339; N. J. 823.

⁷ N. J. 585.

tract' and 'lemon flavor' both mean the same article, while the defendant contends that they do not. It is for you to determine whether by 'lemon extract' and by 'lemon flavor' is meant the same thing in the business world—in the trade, and whether or not the brand upon this bottle of 'lemon flavor' would indicate to the purchaser that it was an article like or equivalent to 'lemon extract'.⁸ A fluid was labeled "Messina Lemon Extract, one ounce, fruit acid 50 percent solution one and one-half to two ounces, crystal foam one-fourth ounce." An analysis showed the following results: Alcohol by volume 33.5 percent, solids 1.28 percent, oil by volume none, citrol percent by weight 0.06, and color natural. It was held that the product was mislabeled.⁹ A bottle was labeled "Extract of Lemon, half strength." It did not contain half strength; and it was adjudged mislabeled.¹⁰ Another fluid was labeled "Extract of Lemon." An analysis showed these results: "Lemon oil by ppt. none, lemon oil by polar none; sp. gr. 15.6° C. 0.9850; citrol 0.11 percent, alcohol by volume 21.20 percent." It was adjudged that the product was mislabeled.¹¹ A label was as follows: "New York Brand Extract Lemon Compound. Formula: Citrol, Lemon Juice, Alcohol, Water. Color Lemon Yel." An analysis showed the following results: "Specific gravity 0.9910, solids 0.32 percent, lemon oil by polarization 0.0 percent, lemon oil by precipitation 0.0 percent, alcohol 7.30 percent, citrol 0.013 percent, citric acid absent, reaction alkaline, colored with naphthol yellow S, methyl alcohol absent." It was adjudged that the product was mislabeled.¹² A product was labeled "Lemon Flavor Artificial Crown Extracts." An analysis showed the following: "Specific gravity 0.9959, ethyl alcohol 13.87 percent, methyl alcohol absent, lemon oil absent, citrol 0.064 percent, solids (principally glycerin), color coal tar dye naphthol yellow S." It was held that it was mislabeled.¹³ A substance labeled "Oil of Lemon about .04, Alcohol about .58, Water about .38, Color a trace,"

⁸ N. J. 194.⁹ N. J. 733.¹⁰ N. J. 738.¹¹ N. J. 739.¹² N. J. 768.¹³ N. J. 774.

which contained about 44.65 percent alcohol by volume and 1.06 percent oil of lemon by volume, is misbranded.¹⁴

§ 319. Extract of Orange.

The label "Extract of Orange Soluble Terpeneless" tends to lead the purchaser into the belief that the product thus labeled is a pure terpeneless orange extract; and if the substance thus labeled is diluted and contains no oil of orange, it is mislabeled.¹ A label was as follows: "Extra Extract Orange." An analysis showed the following results: "Sp. gr. at 15.6° C. 0.9471, orange oil none, aldehyde as citrol 0.07 percent, color—not coal tar—apparently natural, ethyl alcohol by volume 44.60 percent." It was held that the product was mislabeled.²

§ 320. Extract of Peach.

To label a substance "Extract of Peach" which is only an imitation of that product is to violate the statute.¹

§ 321. Extract of Peppermint.

Where a product was labeled "Extract of Peppermint," and it contained less than three percent of the oil of peppermint, it was adjudged misbranded.¹

§ 322. Extract of Pineapple.

A liquid was labeled "Pure Concentrated Extract of Lemon." An analysis of it showed the following result:

Specific gravity	0.9447
Alcohol by volume (percent).....	45.40
Esters as ethyl butyrate.....	0.696
Coloring matter	Turmeric.

This was held to disclose practically the total absence of the sapid and odorous principles of pineapple, and hence was

¹⁴ N. J. 1029.

¹ N. J. 520.

¹ N. J. 661.

¹ N. J. 775.

² N. J. 739.

adulterated and misbranded. "A flavoring extract, as recognized by reliable manufacturers and dealers is a solution," it was said, "in ethyl alcohol of proper strength of the sapid and odorous principles derived from an aromatic plant, or parts of the plant, with or without its coloring matter, and conforms in name to the plant used in its preparation."¹

§ 323. Extract of Rose.

A product was labeled "Extract of Rose." An analysis showed the following: Oil by gravimetric determination 0.35 percent, and coal tar dye and other undetermined coloring matter. The product was a solution of oil in strong alcohol plus artificial color. It was held that it was mislabeled.¹

§ 324. Extract of Strawberry.

To label a liquid "Extract of Strawberry" that is an imitation of that liquid, colored to conceal its inferiority, is to violate the statute.¹ A sample analyzed showed the following results:

Specific gravity (15.5° C.).....	0.9786
Alcohol by volume (percent).....	41.30
Esters as amyl acetate (percent).....	1.72
Color	Coal tar dye.

The analysis, it was held, showed practically the total absence of the sapid and odorous principles of the strawberry, properties derived from aromatic plants and necessary in extracts, and therefore the article was misbranded.²

§ 325. Extract of Vanilla.

A product labeled "Flavoring Extract of Pure Vanilla" is mislabeled if it contains vanillin and caramel,¹ or coumarin

¹ N. J. 152.

² N. J. 143.

¹ N. J. 739.

¹ N. J. 663; N. J. 659; N. J.

¹ N. J. 91; N. J. 218; N. J. 246; 774; N. J. 740; N. J. 842.

N. J. 380; N. J. 892; N. J. 939.

and alcohol.² A bottle labeled "Vanilla." "Scientifically prepared. Colored with harmless color," is mislabeled when the latter words are in so small type as to mislead the purchaser into believing that the bottle contained extract of pure vanilla when it contained an imitation of vanilla artificially colored.³ Vanilla extract is a flavoring extract prepared from vanilla bean, with or without sugar or glycerin, and contains in one hundred cubic centimeters the soluble matters from not less than ten grains of vanilla bean. Consequently, a liquid as follows is adulterated: Volume (c.c.) 122, vanillin (percent) 0.049, resins practically none and coal tar dye present. So this analysis shows an adulteration:

Coumarin (percent)	0.032
Vanillin (percent)	0.07
Resins	Very slight.
Coal tar dye.....	None.
Caramel	Present.
Weight found (grams).....	53.5
Weight should be (grams).....	56.5

To brand it "Vanilla Extract" is to violate the statute.⁴ A bottle was labeled: "One one-fourth ounce Extract of Vanilla, half strength. Infused with vanillin." An analysis showed the following results: "Vanillin 0.25 percent, coumarin none, acetanilide none, resins trace, Leach test negative, alcohol potash test negative, lead number 0.30 percent, artificial color lead acetate filtrate none, natural color high amyl alcohol test normal." It was held that the bottle was mislabeled.⁵ A food product was labeled as follows: (on bottle): "Shepard's Economical Brand Extracts. Vanillin Vanilla flavor, sugar color Serial No. 11648. Manufactured by Shepard Baking Powder Co., St. Louis;" (on carton): "Shepard's Economical Brand Extracts. Vanillin vanilla flavor. Guaranteed economical, sugar colored. We guarantee under the Food and Drugs Act of June 30, 1906. Manufactured by

² N. J. 662; N. J. 619.

N. J. 139; N. J. 148; N. J. 242;

³ N. J. 640.

N. J. 320; N. J. 389; N. J. 548.

⁴ N. J. 14; N. J. 48; N. J. 123;

⁵ N. J. 738.

Shepard Baking Powder Co., St. Louis, Mo. Shepard's for quality. Shepard's Economical flavoring can be secured in the following flavors, vanilla, strawberry, orange, pineapple, lemon, raspberry, almond, banana. Fruit coloring, perfectly harmless. Shepard's vanilla;" (on paper box in which packed): "Shepard's Economical Brand Flavoring Extracts. Mfgd. by Shepard Baking Powder Co., St. Louis, Mo. Shepard's baking powder and pure extracts. Shepard's vanilla. Shepard's." Samples from this shipment were procured and analyzed by the Bureau of Chemistry, United States Department of Agriculture, and the product was found to contain vanillin 0.248 percent, coumarin 0.028 percent, color caramel and alcohol by volume 7.54 percent. It was held that it was misbranded.⁶ A substance labeled as "Vanilla Bean .100, Vanillin .012, Coumarin .001, Alcohol and Water .677, Sugar .200, Caramel .010," which contains an artificial colored solution containing alcohol by volume 8.86 percent, vanillin 0.606 percent, coumarin 0.03 percent, and no vanilla resins, is misbranded.⁷

§ 326. Failure to State Contents.

A failure to state on the label that a medicine contained morphine is misbranding;¹ or that a headache cure contained acetanilid;² or that an alleged cancer cure contained 31.8 percent of acetanilid.³

§ 327. False Statement as to Amount Used in Preparation.

A false statement as to the amount of a particular drug used in a preparation subjects it to condemnation.¹ A statement upon a product of food that "It has accomplished a great work with the sick," can not be used upon a label unless it is the truth.²

⁶ N. J. 740.

⁷ N. J. 1029; N. J. 939.

¹ N. J. 694; N. J. 693.

² N. J. 643.

³ N. J. 635. As to selling coffee

in a pail as Java and Mocha when it was not, and it was not labeled, see N. J. 1014.

¹ N. J. 707.

² N. J. 470. Since the case of

§ 328. Feed.

A stock food bearing a tag that it contains "Tankage, molasses, oats, barley, wheat, buckwheat, salt and charcoal" is misbranded when the mixture is of feed, charcoal, weed seeds and screenings.¹ A label was as follows: "Mixed (Bran) Feed. Made from pure winter wheat and ground ear corn." "Mixed (Middling) Feed. Made from pure winter wheat middlings and ground ear corn." The product was a mixture of wheat bran and ground corncobs, with practically no ground corn kernel. It was held to be misbranded.² To label rice bran as such, in which are rice hulls is to mislabel it;³ so if a food in which oat hulls constitute a part of it.⁴ To state on a label that the feed has "Protein 16-18 percent, Fat $3\frac{1}{2}$ to $4\frac{1}{2}$ percent," is a violation of the statute when it has only 16 percent of protein and less than $3\frac{1}{2}$ percent of fat.⁵ To state on a label that the feed labeled contains ground corn when the product labeled has no corn is to mislabel it.⁶ If a feed contains weed seeds and chaff, it must be so labeled;⁷ so if it contains rice hulls and alfalfa,⁸ or oat hulls.⁹

"It has been brought to the attention of the Board of Food and Drug Inspection that considerable uncertainty exists in the minds of manufacturers of stock feed as to what ingredients are included within the terms 'nitrogen-free extract,' 'carbohydrates,' and 'sugar and starch.' Confusion in this particular results in part from the varied interpretation given to the feeding stuff laws of different States. Each of the terms has a definite significance. The term 'nitrogen-

United States v. Johnson, 31 Sup. Ct. 627, there is doubt about the soundness of this decision. See § 405.

¹ N. J. 691; N. J. 810. See § 374 (Sugarota).

² N. J. 66; N. J. 119; N. J. 314; N. J. 809.

³ N. J. 104; N. J. 174; N. J. 256; N. J. 315.

⁴ N. J. 171; N. J. 230.

⁵ N. J. 172; N. J. 463 (shorts); N. J. 464; N. J. 116; N. J. 117; N. J. 322 (corn alfalfa); N. J. 391; N. J. 435; N. J. 540; N. J. 786.

⁶ N. J. 400.

⁷ N. J. 432.

⁸ N. J. 477.

⁹ N. J. 468; F. I. D. 533.

free extract' includes starch, sucrose, reducing sugars, pentosans, organic acids, coloring matter, and certain other ingredients in small quantities, and the amount of nitrogen-free extract present in a stock feed is determined by subtracting the sum of the moisture, crude fiber, protein, fat, and ash content from 100 percent. Stock feed will not be held to be misbranded on account of statements on labels of the 'nitrogen-free extract' content if analysis shows that the amount obtained by this method is correctly declared.

"The term 'carbohydrates' includes most of the specified ingredients which make up the nitrogen-free extract, plus crude fiber, but does not include organic acid and coloring matter. The amount of ingredients included in nitrogen-free extract which are not carbohydrates is so small in stock feeds that they may be disregarded in stating the amount of carbohydrates, and stock feeds will not be held to be misbranded on account of statements on labels of the proportion of carbohydrates if analysis shows that the percentage of carbohydrates declared equals the percentage of nitrogen-free extract obtained as indicated, plus the percentage of crude fiber.

"Sugar and starch are carbohydrates and are included in determining the amount of carbohydrates present in stock feed. The term 'starch and sugar,' however, is properly applied only to the actual starch, sucrose, and reducing sugars contained therein, and stock feed will not be held to be misbranded on account of statements on labels of the percentage of starch and sugar, as such, if the percentage stated is the correct percentage of the amount of the starch, sucrose, and reducing sugars actually present."¹⁰

"The department has frequently received inquiries in regard to the labeling of bran, of which the following is a fair sample:

'Can the screenings of wheat, consisting principally of shrunken seed, etc., be put in the bran and it still be called bran, etc.'

¹⁰ F. I. D. 124.

"Since the above is clearly in violation of those provisions of the law requiring that a food product be true to the label, the department is of the opinion that it will be necessary to label such a mixture as 'Bran and Screenings.'

"It has recently come to the attention of the department that a number of the cattle and poultry foods sold on the American market contain enough poisonous weed seeds, such as corn cockle and jimson weed (Jamestown weed), to have a more or less toxic effect on poultry, cattle, etc. Poultry and cattle foods which contain poisonous weed seeds in appreciable quantities will be considered as adulterated in accordance with those provisions of the Food and Drugs Act, June 30, 1906, forbidding the presence of poisonous or deleterious ingredients.

"The department has been asked by the manufacturers of medicinal mixtures for poultry, cattle, etc., whether such mixtures may, under the law, be labeled respectively as cattle and poultry foods. It is thought, first, that the words 'Cattle Food' or 'Poultry Food' should apply to cattle or poultry foods which are not mixed with any condimental or medicinal substance or substances; second, that mixtures of cattle and poultry food materials, with small quantities of condiments, such as anise seed, ginger, capsicum, etc., should be labeled as 'Condimental Cattle Food,' or 'Condimental Poultry Food;' and third, that mixtures of cattle-food materials with medicinal substances, such as arsenic, sulphate of iron (copperas), etc., should not be labeled as foods, but as medicines, or remedies. For example, under the latter ruling, a cattle food mixed with medicinal substances, such as arsenic, copperas, etc., should be plainly labeled as a remedy, or medicine, so as to differentiate clearly such a substance from a cattle food material unmixed with medicinal agents."¹¹

A feed was branded as follows: "Corno Horse and Mule Feed. Mixture of ground alfalfa, oats, corn, flax bran, oat and hominy feeds, made by the Corno Mills Company, East St. Louis, Illinois. Guaranteed analysis: Protein 10 percent,

¹¹ F. I. D. 90. See N. J. 990.

sugar and starch 58.5 percent, fat 3.5 percent, fiber 12 percent." An analysis of a sample of this product showed the presence in it of about 15 percent oat hulls and practically no oats, moisture, 9.84 percent, protein 10.63 percent, and fiber 15.24 percent. On the trial of the case it was "admitted that there was present in this Corno Horse and Mule Feed, a quantity of oat hulls in excess of the amount that would have been naturally and normally present in case whole ground oats had been used in lieu of the same amount of oat feed, using the term oat feed according to the construction contended for by the claimants; namely, as a by-product of the oat meal or rolled oat factory, said product consisting of the entire residue of the oats after the manufacture of the oats into food for human consumption, and consisting of the middlings, nubbins, oat dust and hulls; by this admission it is meant that there was used in this Corno Horse and Mule Feed a quantity of by-product of the rolled oat mill consisting of oat hulls, middlings, nubbins and dust as above described." The District Court for the Middle District of Alabama held that this product was not misbranded, and the Department of Agriculture accepted this decision as correct.¹²

§ 329. Fish.

To label fish as "Broiled California Mackerel," and add "Pilehard or Sardinia Caeruleus" in such small type as they are noticeable only upon close inspection, when in fact the product labeled was not California mackerel but California sardine, is to mislabel it, though the name of the product was truthfully stated in small type.¹ To label fish as "Norway Cod Strips" when they were packed in California is to mislabel them.² To label lake herring "white fish" is to violate the statute.³ To label codfish taken in American waters as "Italian Codfish" is to mislabel it.⁴

"Many inquiries have been made of the department regard-

¹² N. J. 990.

² N. J. 306.

¹ N. J. 365.

⁴ N. J. 779.

³ N. J. 506.

ing the nomenclature commonly employed in designating canned salmon. It is stated that inferior species of salmon are frequently canned and labeled with some name which is understood by the trade to indicate the presence of fish of an inferior variety but which is not so understood by the consumer; as, for instance, 'Alaska Salmon.' The department is informed by the Bureau of Fisheries that the species of salmon in the United States are as follows:

1. *Oncorhynchus nerka*. Sockeye or sockey salmon, blueback salmon, red salmon, redfish, or nerka salmon.
2. *Oncorhynchus tshawytscha*. Chinook salmon, king salmon, quinnat salmon, tyee salmon, or spring salmon.
3. *Oncorhynchus gorbusha*. Humpback salmon, pink salmon, or gorbusha salmon.
4. *Oncorhynchus kitsutch*. Coho salmon, silver salmon, or medium red.
5. *Oncorhynchus keta*. Calico salmon, keta salmon, dog salmon, or chum salmon.
6. *Salmo gairdneri*. Steelhead salmon, steelhead, hardhead, winter salmon, salmon trout, or square-tailed trout.
7. *Salmo solar*. Atlantic salmon.

"Two additional species of landlocked salmon exist in certain New England and Canadian lakes. Neither of these nor the Atlantic salmon is ever canned. Considering this fact, and the further fact that many packers put up humpback and dog salmon under fancy names and thus sell them to consumers who may believe them to be of superior varieties, it is held that canned salmon should be labeled with one of the common names mentioned above as belonging to the species of fish canned.

"A similar question has frequently been raised regarding whitefish. A fish designated as *Argyrosomus artedi*, usually called lake herring or cisco, is put on the market at times as 'family whitefish.' The following is quoted from a communication from the Bureau of Fisheries:

"The whitefish tribe in America has numerous representatives, and at least 12 species are regularly caught for market and others will doubtless in time acquire economic importance. Those now taken are:

'Common whitefish of Lake Ontario and Lake Erie, *coregonus albus*; common whitefish of Lake Huron, Lake Michigan, Lake Superior, Lake

of the Woods, Lake Winnepeg, etc., *coregonus clupeiformis*; Rocky Mountain whitefish, *coregonus williamsoni*; broad whitefish or Alaska whitefish, *coregonus kennicotti*; Menominee whitefish or round whitefish, *coregonus quadrilateralis*; lake herring, or cisco, *argyrosomus artedi*; jumbo herring, or Erie cisco, *argyrosomus eriensis*; Huron cisco or herring, *argyrosomus huronius*; moon-eye, or chub, *argyrosomus hoyi*; longjaw whitefish, or bloater, *argyrosomus prognathus*; longjaw of Lake Superior, *argyrosomus zenithicus*; blackfin or bluefish whitefish, *argyrosomus nigripinnis*; tullibee whitefish, *argyrosomus tullibee*.

To most of these species the name "whitefish," with a qualifying word, is strictly applicable; but there is a wide range in food value, and to permit the sale of most of them as plain "whitefish" would be unjust to the public. The Bureau does not know that this general question has come before your Board, or that you wish to consider it at this time, but sooner or later it will be necessary to render a decision, and at any time it may be brought to your attention because of cases arising in the Washington, D. C., market, where one of the commonest and best of the fish foods is "smoked whitefish"—consisting of any one of three or four species of *coregonus* and *argyrosomus*, none of them *clupeiformis* or *albus*. Under these circumstances it would appear to this Bureau to be proper and feasible to require the different kinds of preserved whitefish to be designated by their qualifying names. The most appropriate name for "family whitefish" is lake herring or cisco; but whitefish as here used would mean, or would be intended to mean, the common whitefish, the best of the tribe.⁵

"In harmony with the opinion of the Bureau of Fisheries, the board holds that the term 'whitefish' should be applied only to the common whitefishes, *Coregonus albus* and *Coregonus clupeiformis*, unless prefaced by the name of the particular species of whitefish employed. The fishes commonly known to the fishermen and the trade as 'lake herring' and 'cisco' should be so called, with or without qualifying names, but should not be designated 'whitefish'."⁵

§ 330. Flavoring Extracts.

"The percentage of alcohol is not required to be stated in the case of extracts sold for the preparation of foods only. It is held, however, that extracts which are sold or used for any medicinal purpose whatever, should have the percentage of alcohol stated on the label.

⁵ F. I. D. 105.

"Numerous inquiries are received regarding the proper designation of products made in imitation of flavoring extracts or in imitation of flavors. Such products include 'Imitation vanilla flavor,' which is made from such products as tonka extract, coumarin and vanillin, with or without vanilla extract. They may also include numerous preparations made from synthetic fruit ethers intended to imitate strawberry, banana, pineapple, etc. Such products should not be so designated as to convey the impression that they have any relation to the flavor prepared from the fruit. Even when it is not practicable to prepare the flavor directly from the fruit, 'imitation' is a better term than 'artificial.'

"These imitation products should not be designated by terms which indicate in any way by similarity of name that they are prepared from a natural fruit or from a standard flavor. The term 'venallos,' for instance, would not be a proper descriptive name for a preparation intended to imitate vanilla extract. Such products should either be designated by their true names, such as 'vanilla and vanillin flavor,' 'vanillin and coumarin flavor,' or by such terms as 'imitation vanilla flavor' or 'vanilla substitute.'

Articles in the preparation of which such substitutes are employed should not be labeled as if they were prepared from standard flavors or from the fruits themselves. For instance, ice cream flavored with imitation strawberry flavor should not be designated as 'strawberry ice cream.' If sold as strawberry ice cream without a label the product would appear to be a violation of Regulation 22.

"Artificial colors should be declared whenever present."

§ 331. Flour.

Flour made from durum wheat can not be branded as made from "hard spring wheat."¹ Flour manufactured in Ohio can not be labeled "Paragon Minnesota Cream Roller Process."² Flour containing less than 18.25 percent mini-

¹ F. I. D. 47. See Extract of Lemon, etc. ² F. I. D. 13; N. J. 439; N. J. 443.

¹ F. I. D. 12.

mum crude protein can not be labeled as containing 18.25 percent, nor that containing less than 5.25 percent of fat as containing 5.25 percent.³

"The following communication has been received respecting the mixing of flours of different cereals:

In conformity with the custom of a century or more, the manufacturers of rye flour, in order to produce a lighter and more easily worked flour, have added a proportion of wheat flour to their rye and branded it "rye flour."

This custom simply conforms to the consumers' demand for a whiter loaf and from every standpoint is a perfectly legitimate operation.

Under the interpretation of the food and drugs Act of June 30, 1906, apparent restrictions are placed upon their compounding, and I would therefore respectfully ask your ruling upon the following points:

'1. Under this interpretation would it be necessary to add the word "compound" to the brands?

'2. Will it be necessary in accordance with this interpretation to name in the brand the fact that a wheat admixture has been made, in addition to the use of the word "compound," providing that word is necessary?

'3. Referring to paragraph f, Regulation 17, which reads as follows:

"An article containing more than one food product or active medicinal agent is misbranded if named after a single constituent," will it be permissible to still name the rye-wheat admixture "rye-flour?"

"The Food and Drugs Act of June 30, 1906, and the rules and regulations made thereunder, provide for the proper marking of food products and penalties for misbranding.

"The Act also provides that a food product is not misbranded 'in the case of articles labeled, branded or tagged so as to plainly indicate that they are compounds, imitations or blends, and the word "compound," "imitation," or "blend," as the case may be, is plainly stated on the package in which it is offered for sale.'

"Keeping in view these provisions of the law, and rules and regulations made thereunder, it appears that the mixing of rye flour and wheat flour is not prohibited by the law provided the package is marked 'compound' or 'mixture,' the word standing alone and without qualification, and also if the label contain the information which shows that it is

³N. J. 374.

properly branded. The mixture may also be denominated a 'blend' if rye flour and wheat flour be regarded as like substances. It is held that this information in the case mentioned would be a statement of the ingredients used in making the compound. It is further held that the use of an ingredient in small quantity simply for the purpose of naming it in the list of ingredients would be contrary to the intent of the law, and therefore that the ingredients must be used in quantities which would justify the appearance of their names upon the label. The statement made of the constituents used should be of a character to indicate plainly that the article is a compound, mixture, or blend.

"It is evident from the above explanation that the naming of a mixture of this kind 'rye flour' would be plainly a violation of the law and the regulations made thereunder.

"Attention is called also to the Act of Congress approved June 13, 1898, U. S. Revised Statutes, sections 36 to 49 inclusive, imposing special taxes under the supervision of the Commissioner of Internal Revenue on mixed flour."

§ 332. Flour Bleaching.

To label a product "flour" that has been bleached by the Alsop process is to misbrand it.¹

§ 333. Frou Frou Biscuits—Boric Acid.

Labeling a case as containing "Frou Frou Biscuits" when the biscuit contains boric acid or compounds of it which render the article injurious to health, is a misbranding of the article.¹

§ 334. Fruit Syrups.

Fruit syrups not made from the fruit their name indicates they are made from can not be labeled by the name of such fruit.

⁴ F. I. D. 42. Flour labeled as having been ground in Pennsylvania when it was ground in Kansas, is mislabeled. N. J. 940.

¹ N. J. 799; N. J. 722. This

Notice of Judgment contains the evidence given at the trial in the United States Court. See also F. I. D. 100.

¹ N. J. 696.

Thus a syrup not made from pineapple can not be labeled "Pineapple Syrup," nor one not made from cherries labeled "Cherry Syrup," nor one not made from orange labeled "Orange Syrup."¹

§ 335. Gelatin.

"The following letter was recently received at the Department of Agriculture:

'We import a preparation of gelatin preserved with sulphurous acid for the purpose of fining wine. This gelatin is not used as a food and does not remain in the wine, although a small amount of the sulphurous acid may be left in the wine. Please inform us if the sale of this product is a violation of the food law.'

"It is held that the products commonly added to foods in their preparation are properly classed as foods and come within the scope of the Food and Drugs Act. The department can not follow a food product into consumption in order to determine the use to which it is put. Pending a decision on the wholesomeness of sulphurous acid as provided in Regulation 15 (b), its presence should be declared."²

Gelatin may be used in food products or confectionery if made from unobjectionable and good raw material in a sanitary way.

§ 336. Gin.

To use strychnine, brucine and salicylic acid in gin is to violate the statute; and a liquid, therefore, labeled 'Damiana Gin' having those poisons in it is mislabeled.¹ A gin was labeled "Geneva Cross Gin. This superior liquor is specially recommended for medicinal purposes. Genuine Gin. Also known as Geneva." It was a domestic product. It was held that it was misbranded.²

§ 337. Ginger Ale.

A product was labeled "Ginger Ale. Guaranteed under the

¹ N. J. 328; N. J. 372; N. J. 549.

¹ N. J. 245.

² N. J. 770; N. J. 771.

¹ F. I. D. 48.

Food and Drugs Act of June 30, 1906." An analysis showed it contained benzoic acid, saccharine, capsicum and caramel. It was held that it was mislabeled because it did not show those elements.¹ Barrels containing a product were labeled: "The Beaufont Lithia Water Co.—12 Doz. Pints Beaufont Ginger Ale—Delicious Flavor—Perfect Quality—Richmond, Va." Each of the bottles in these barrels was labeled as follows: "The Perfection of Purity and Excellence—Beaufont Medicinal Ginger Ale—Highest Quality—Refreshing Invigorating—The Beaufont Lithia Water Co., Richmond, Va., U. S. A." An analysis of the product showed the presence of ginger and capsicum and also showed that there was nothing used in the manufacture of the product which would entitle it to be termed "the perfection of purity and excellence," nor the "highest quality," nor "medicinal," as stated on the labels. The court held that the product was misbranded.²

§ 338. Glucose.

A substance labeled "Gilt-edge Brand Wet Mincemeat" is mislabeled if commercial glucose be used in it instead of sugar.¹

§ 339. Gluten Flour and Gluten Farina.

A product labeled "Gluten Farina" and "Gluten Flour" which does not contain gluten as the principal ingredient and not sufficient to entitle the product to that name, is mislabeled.¹ Gluten flour is the clean, sound product made from flour by the removal of starch and contains not less than five and six-tenths percent of nitrogen and not more than ten percent of moisture. Therefore to label a product containing 12.80 percent of moisture and 1.53 percent of nitrogen as "Gluten Flour" is to mislabel it.²

¹ N. J. 741.

¹ N. J. 250.

² N. J. 1026.

² F. I. D. 3.

¹ N. J. 639.

§ 340. "Hen-E-Ta Bone Grits."

A substance labeled "Hen-E-Ta Bone Grits, 30 percent pure bone ash" is mislabeled if it has a substance substituted for the bone.¹

§ 341. Honey.

A product containing invert sugar and glucose can not be labeled as "Honey."¹

§ 342. Ice Cream.

A product out of which the cream has been abstracted and gelatin substituted can not be labeled "ice cream."¹

§ 343. Jam.

A substance labeled "Choice Home Made Pure Currant Jam. Made from fresh fruit" is mislabeled if not made from fresh fruit, and if it contain a mixture of water, sugar, dried currants, and apple juice.¹ Where the label on a jam jar indicated that it contained 30 percent of granulated sugar and 8 percent of corn syrup, when as a matter of fact it contained 59.4 percent of glucose and only 2.17 percent sugar, it is mislabeled.² Jam made out of logan berries can not be labeled "strawberry jam."³

§ 344. Jelly.

A product containing glucose can not be labeled "Made of Apple Juice and Sugar."¹ A product labeled "Currant Jelly," followed by the words in small type, "blended with apple and other fruit juices" is mislabeled.² Jelly labeled as containing 40 percent of glucose is mislabeled when it contains 70.70 percent of it.³ To label a jelly in such a man-

¹ N. J. 625.

¹ N. J. 18; N. J. 19; N. J. 20;
N. J. 21; N. J. 269.

¹ N. J. 438.

¹ N. J. 641.

² N. J. 476.

² N. J. 602.

¹ N. J. 238; N. J. 872.

² N. J. 415.

³ N. J. 552.

ner as to lead one to believe it was made by a particular person, when in fact it was not made by him, is to mis-label it.⁴

§ 345. Kola Syrup.

Jugs were labeled "Dr. Don's Kola: Directions—Carbonate at 60 lbs. pressure, throwing one ounce to a half pint bottle." It was found to be a syrupy liquid consisting essentially of caffeine 0.09 percent, cocaine, phosphoric acid, sugar, flavoring and coloring agents, and water. It was held to be mis-branded, because it contained no substance derived from the cola-nut or cola-plant, and because it contained no statement that it contained caffeine, cocaine and cocaine derivatives and phosphoric acid.¹

§ 346. Lemon Oil.

A product in which sesame oil has been mixed can not be labeled as "Lemon Oil."¹

§ 347. Linseed Meal.

A label on a product was as follows: "Pure old process Linseed Meal. Guaranteed Analysis: Protein 34 percent, crude fat and oil 9 percent, crude fiber 8 percent." It contained moisture 9.87 percent, ether extract 9.53 percent, protein 31.66 percent and crude fiber 7.96. It was held mis-labeled as to the protein.¹

§ 348. Macaroni.

The use of a label as follows: "Macaroni Savoia Brand Gragnano," and had between the words "Savoia" and "Gragnano" the shield of Italy, together with a representation of a mountain or volcano and a castle, is a violation of the statute when the macaroni thus labeled was made in the United

⁴ N. J. 580.

¹ N. J. 784.

¹ N. J. 505. See Extract of Lemon, § 318.

¹ N. J. 728.

States.¹ The use of foreign words upon domestic macaroni which leads the purchaser to believe it is a foreign production is prohibited.² A product was labeled "Trinacria Macaroni Works Pasta Extra Sicilia," with word "Style" inconspicuously placed at the bottom of the label. It was made in America. It was held to be misbranded.³

§ 349. Maple Sugar.

Pails of sugar were labeled "Vermont Sugar." It was made in Vermont, and had the appearance of maple sugar. It bore no label, brand, or device of any kind showing the true character of the article. It was a mixture of cane and maple sugar of nearly equal parts. The court condemned the entire lot, and ordered it sold.¹ Where a product was branded "Mapleine" it was left to the jury to determine whether it was the intention of the manufacturers to give a purchaser the impression that it was maple sugar; and if the product was not maple sugar, it was misbranded.² To brand a jar as "Maple Syrup," when only 50 percent of it is such, is to misbrand it.³ To brand a product as "Maple Sugar 40 percent, Cane Sugar 60 percent," when it contains no maple sugar is to mislabel it.⁴ So to brand a product composed in part of sucrose syrup as "Pure Vermont Maple Syrup" is to mislabel it.⁵ Likewise to label a product as "Baker & Co.'s Cane and Maple Sugar Syrup," so placing the words "cane and" thereon as to be practically invisible, and it consists almost entirely of cane sugar syrup, is to mislabel it.⁶ Labeling a product "Maple Syrup" when it contains glucose is a violation of the statute.⁷ So if it contains cane syrup,⁸ or 5½ percent water.⁹

¹ N. J. 167; N. J. 262; N. J. 776.

² N. J. 487; N. J. 600.

³ N. J. 804.

⁴ N. J. 107; F. I. D. 47; N. J. 802; N. J. 1015, § 330; N. J. 928.

⁵ N. J. 163.

⁶ N. J. 469; N. J. 107; N. J. 793.

⁷ N. J. 98. See also Section 372.

⁸ N. J. 198.

⁹ N. J. 209.

¹ N. J. 290; N. J. 403.

² N. J. 591; N. J. 412.

³ N. J. 603.

A substance was labeled as follows:

"Aunt Jemima's Sugar Cream A blend of rock candy and maple syrup creamed Dainty Desserts made from Aunt Jemima's Sugar Cream a blend of rock candy and maple syrup creamed. Aunt Jemima's Sugar Cream."

"Aunt Jemima's Sugar Cream. A delicious sauce for table use, pancakes, biscuits, waffles, puddings, etc. For layer cake it makes an excellent filler and icing. For icing cakes it should be slightly warmed by immersing can in hot water. If syrup separates to top of cream stir with table knife until uniform."

It actually consisted of rock candy, maple syrup and glucose. It was held that it was not labeled correctly.¹⁰ A product was labeled "Western Reserve Ohio Blended Maple Syrup. Guaranteed absolutely pure." The mixture was composed largely of refined cane sugar flavored with extract of maple wood. It was held that there had not been a violation of the statute, because of the use of the word "blend," the court saying:

"In the argument at bar of the case it was contended for the respondent that there is a distinct and substantial difference in the labeling upon the cases and that upon the boxes; that in the former the word 'Maple' is used, and in the latter, the case of the bottles, that word is omitted, as a qualifying word in the description of the syrup. Without again quoting the words of the labeling, but referring again to them as above set out in this opinion, it will be seen that, while the word 'Maple' is not used as a qualifying word to syrup, yet further on in the words of the label it is found that respondent describes itself as blenders of 'Fancy Maple Syrup and Maple Sugar,' so that, when all the words of the label put upon the bottles are seen, and its full meaning comprehended, I think the same meaning was intended in the use of both labels, and from either of them, that upon the cases and that upon the bottles, a person of ordinary intelligence, after reading them or either of them, would infer the same meaning that the bottles, as well as the boxes, contained blended maple syrup. So it seems to me that the contention of the respondent that the label upon the boxes, which alone was intended to induce the purchasers, even conceding this, is without force. It then being determined that the labeling upon the cases and upon the bottle mean the same thing, namely, that each contained blended maple syrup, it only remains to decide whether, in view of the other averments of the libel, a violation of the statute is shown.

"If the brands or labels correctly or truthfully disclose the contents

¹⁰ N. J. 384; N. J. 325.

of the cases and bottles, and no poisonous or deleterious ingredients are apparent, there can, I am persuaded, be no violation of the law, and this action could not be supported. There is no claim that poisonous or deleterious ingredients entered into the compound. The libel avers it was not maple syrup. The labels do not purport to state that the contents of the bottles was maple syrup; but, as said before, both labels represent the same fact—that the contents of the boxes and bottles was blended maple syrup. The libel avers that the cases and bottles do not contain a blend of maple syrup, and then specifically states they do contain a mixture or compound largely of refined cane sugar flavored with an extract of maple wood. The demurrer of the respondent to the libel admits all the facts well pleaded in the libel, and, while it is stated by the libel that the boxes and bottles do not contain a blend of maple syrup, the following statement in the libel, that the contents consisted of a mixture or compound largely of refined cane sugar flavored with an extract of maple wood, renders the previous negation of a blend of maple syrup nugatory as a fact stated, but leaves it as a mere conclusion of the pleader, that is not admitted by the demurrer. So it seems to me the case resolves itself to the single question whether a mixture or compound largely of refined cane sugar flavored with an extract of maple wood is blended maple syrup.

“The plain and manifest object of the statute under consideration is to protect the purchasers and consumers of drugs and foodstuffs from fraud and imposition in the purchase or consumption of such articles under false representations, and to insure that the commodities are such as they are represented to be. If the brands or labels upon the goods in question were truthful, and such as the law permitted upon such goods as they actually were, then there was no violation of the law, and the goods were wrongfully seized, and should be returned to the person or persons from whom they were taken. The proviso to Section 8 of the statute under which this libel is being prosecuted provides in legal effect, amongst other things, that an article of food which does not contain any added poisonous or deleterious ingredients shall not be deemed to be adulterated or misbranded in the case of articles labeled, branded, or tagged so as to plainly indicate that they are compounds, imitations, or blends, and the word ‘compound,’ ‘imitation,’ or ‘blend,’ as the case may be, is plainly stated on the package in which it is offered for sale; and the term ‘blend’ so used, shall be construed to mean a mixture of like substances, not excluding harmless coloring or flavoring ingredients used for the purpose of coloring and flavoring only.

“I have already said that the brands or labels in question plainly indicate that the article of food, the syrup in this case, was a blend of maple syrup, and the statute itself declares that the term ‘blend’ shall be construed to mean a mixture of like substances, not excluding harmless coloring or flavoring ingredients, used for the purpose of coloring and flavoring only. I think I may take judicial notice of all that an ordinarily intelli-

gent person knows, and in doing this I know that food syrup is a saccharine solution of a superior quality, frequently called molasses, and it may be made of any of the various sugars of commerce, such as cane, beet, or maple. These sugars are alike, in that they are saccharine. The statute defines a blend of anything to be the mixture of like substances not excluding the flavoring. In the case presented the mixture is cane sugar flavored with extract of maple wood. It seems to me no argument is necessary to prove that all food sugars are of like substances, and to them or any of them add the flavoring extract of maple wood and thereby is produced the very blend contemplated by the exception of the statute I have endeavored to point out.

"Even without this plain exception provided for by the law itself, no ordinarily intelligent person could be deceived by the labels in question into buying the articles so labeled for real maple syrup. The word 'blend' is clearly used, both as to the articles and their manufacture, and of its own clear import indicates a mixture and imitation. Entertaining the views I have expressed, it follows that I am of the opinion the libel is insufficient in law, and the demurrer will therefore be sustained."¹¹

In another case the product was labeled "Topmost Cane and Maple Syrup. This product is composed of the following ingredients and none other: Cane syrup 60 percent, maple syrup 40 percent." Among other things the court charged the jury as follows, and there was a verdict of guilty:

"Now, coming to the question—and there does not seem to be much dispute in this case as far as you are concerned—matters for you to determine. There does not seem to be much dispute in this case to bother your minds, that is to say, dispute between witnesses. The difficulty here, if any there be, is in coming to a conclusion of the evidence of the witnesses introduced on one side, as to whether or not the testimony reads within the meaning of this law, the delivery of a thing containing something that was enclosed in a thing misbranded, bearing a false and misleading brand. In other words, it is difficult, if any there be, in construing or interpreting, or analyzing and concluding whether or not these things come within the law—no dispute between the witnesses. The label, as I stated a while ago, and as you know, contains a statement that the contents, in substance the contents of this parcel contain forty percent maple syrup, and, as I said a while ago, this law forbids the placing upon the parcel of a label containing that statement, if it is substantially untrue, or substantially misleading. So, the question for you to decide is whether or not this parcel

¹¹ United States v. Sixty-eight Cases of Syrup, 172 Fed. 781; N. J. 283. See N. J. 276.

contained a substance, one of the ingredients of which was maple syrup, and if so whether that ingredient, maple syrup, constitutes forty percent of the commodity. That is the question for you to determine. And on that question you have had here the testimony of chemists, and I say to you in this kind of a case I suppose that that is about the best testimony we can get. I suppose you probably can not take that can and determine the contents, the ingredients of the contents. That is the matter for chemical analysis; and yet you have a right, when you go to your jury room, to open that can and determine by your taste, if under your oaths in accordance with the rules I have laid down, you can do it and are satisfied to do it, you may open that can and by your taste determine this defendant to be not guilty. You have that power under the law, and three experts, not a hundred experts, can take that power away from you, a power, however, to be exercised having regard to the nature of a function which under our system you here exercise, exercising it with no purpose in the world save only to arrive at the truth of the matter, always bearing that in mind.

"Now, the dispute is between this prosecution and this defense as to whether or not there is any way of determining what is meant by the expression, 'maple syrup,' or 'pure maple syrup,' or 'genuine maple syrup.' For the United States the position is that the phrase 'maple syrup' used on this label of this defendant is to be understood as meaning to him who put it there, and as having been intended by him to be read by him who saw it there, as meaning the result of boiling down the sap of the hard maple tree to a degree or state of consistency where it would be regarded and called maple syrup, excluding the addition to it of any outside substances, excluding putting into it anything in the way of an adulterate—the product solely of boiling down the sap of the hard maple tree. Now, my own judgment is that it is not a serious question, as you might suppose, having in mind that that is what it means—the product solely of boiling down the hard maple sap. It is my judgment that it isn't very important whether it was boiled down to a point where there was within the resultant product thirty-four percent of water or thirty-six percent of water, or forty percent of water. It might very rationally and reasonably still be called maple syrup. The tests which these witnesses have gone by have been explained to you. One has been called the lead test. What that means the witnesses have told you. I will not undertake to repeat to you what they said to you they had in mind when they talked about that test. The ash test is another way which they explained to you, and that test is as familiar to you as to me.

"Now, their testimony is that, subjecting the contents of the can to those two tests, certain facts appeared, which facts have been detailed to you by the several witnesses as to the presence of ash and the condition shown by the lead test, and the witnesses have testified as to the amount of ash necessarily and essentially present in pure maple syrup, and you are dealing here, when you talk about maple syrup, you are dealing with pure

maple syrup, as I have defined to you the meaning of maple syrup heretofore in these instructions; and by those tests the reasoning of the witnesses is that the contents of this tin receptacle contain the percentage (and it is a percentage per volume of contents)—the percentage of maple syrup within the can.

"I do not know how I can any better explain to you the nature of this charge. It is a new field. There are questions involved which would be more satisfactorily disposed of by the court, after a better opportunity for consideration and reflection than is afforded in the trial of the case, the day after day trial of the case with sessions of the court separated by periods which are largely clogged with other business than the business which calls you here. I have done the best I can in defining to you what the issue is in this case. It is your duty to answer this question: guilty or not guilty, to the best of your ability. If you find for the United States, the form of your verdict will be : we, the jury, find the defendant guilty; if you find for the defendant, the form of your verdict will be: we, the jury, find the defendant not guilty."¹²

"The director of the agricultural experiment station at Orono, Maine, in a recent letter made the following statement:

"There are in Maine many syrups which are labeled something like this: 'A Fancy Quality Syrup Made from Pure Maple and White Sugar.' Many of these syrups carry but little maple, one company saying that in a syrup analogous to this they put ninety percent of cane sugar and ten percent of maple.'

"When both maple and cane sugars are used in the production of syrup the label should be varied according to the relative proportion of the ingredients. The name of the sugar present in excess of 50 percent of the total sugar content should be given the greater prominence on the label; that is, it should be given first. For example, a syrup the sugars of which consist of 51 percent cane sugar and 49 percent maple sugar would be properly branded as 'Syrup Made from Cane and Maple Sugar,' or as 'Cane and Maple Syrup.' The terms 'maple sugar' and 'maple syrup' may only be used on the label as part of the name when those substances are present in substantial qualities as ingredients. They should not appear on the label as part of the name when only a small quantity of those substances is used to

¹² N. J. 271.

give a maple flavor to the product. A cane syrup containing only enough maple syrup or maple sugar to give a maple flavor is properly labeled as 'Cane Syrup, Maple Flavor' or 'Cane Syrup Flavored with Maple.'

"Whenever it is necessary to declare cane sugar (sucrose) on a label it should be declared as cane sugar and not as white sugar."¹³

A sugar was labeled "Blended Cane and Maple Sugar," which was moulded into cakes but was sold and invoiced as maple sugar. The product consisted of a mixture of cane and maple sugar. The government claimed that the product was misbranded for the reason that it was sold and invoiced as maple sugar, when, in fact, it was an imitation of and was sold under the distinctive name of maple sugar, but being a mixture of cane sugar and maple sugar. The words "compound, imitation, or blend" were not plainly stated on the package in which it was sold. The owner pleaded guilty to the charge of misbranding.¹⁴

¹³ F. I. D. 75.

Syrup, ten percent of which is made from maple sugar and ninety percent from white sugar, put up in bottles having thereon labels containing the name "Gold Leaf Syrup," with a trademark consisting of a gold leaf in the form of a maple leaf and stalks of sugar cane, and the words "composed of maple and white sugar" in plain and distinct letters, with the name of the maker, can not be said to be misbranded, so that its shipment in interstate commerce constitutes a misdemeanor under Food and Drugs Act, June 30, 1906, c. 3915, § 2, 34 Stat. 768 (U. S. Comp. St. Supp. 1907, p. 928). In re Wilson, 168 F. 566; United States v. Bockmann, 176 Fed. 382.

An article of food, put up and sold in cases bearing principal labels, describing the contents as a

particular brand of molasses, but plainly stating in three separate places that the product is a compound of molasses and corn syrup, and also containing all the other information required by Food and Drugs Act, June 30, 1906, c. 3915, 34 Stat. 768 (U. S. Comp. St. Supp. 1909, p. 1187), and the regulations thereunder, and which article is in fact a compound of molasses and commercial glucose, is not adulterated nor misbranded within the meaning of such Act; it being shown that it contains nothing deleterious to health, and that under the rulings of the department it is permissible to describe commercial glucose on labels or brands as made from corn syrup. United States v. Seven Hundred and Seventy-nine Cases of Molasses, 174 F. 325.

¹⁴ N. J. 1015.

§ 350. Meal.

To label a meal as follows: "Old Log Cabin Meal. Fresh Ground Meal. Best Water Ground Style," is to represent it was ground by the water process or in buhr mills and not by steam roller process and if it was ground by steam roller process, then it is mislabeled.¹

§ 351. Milk.

To put milk in bottles and brand or label such bottles with the word "Milk" is to represent that the product is unadulterated milk, though not of any particular quality. It may be milk containing a low grade of milk fat, and yet be pure milk,—just as it came from the animal. If the milk is sold in a community where only cow's milk is used, then the representation would be that it was cow's milk. So where a product was labeled "Pure Vacuum Dried Milk Flour, containing 5 percent Butter 'Fat,'" and it was manufactured from a closely skimmed milk and contained only between 1 percent and 2 percent butter fat, it was held that it was mislabeled.¹

§ 352. Mince Meat.

A substance labeled "Gilt-edge Brand Wet Mince Meat" is mislabeled if it contains commercial glucose in place of sugar.¹

§ 353. Molasses—Glucose.

A product was labeled "Re-boiled Open Kettle Molasses." An analysis showed that it contained 49.82 percent of glu-

¹ N. J. 44.

¹ N. J. 211; N. J. 273. See also N. J. 979.

If a would-be purchaser asks for "milk" he has a right to expect he will receive unadulterated milk, although he has not used that

word, nor asked for "pure milk," or in any other way qualified his request. *Kench v. O'Sullivan*, 10 N. S. W. L. R. 606, 27 W. N. (N. S. W.) 137.

¹ N. J. 639.

cose. It was held that it was mislabeled.¹ So where the product was 27.8 percent glucose.² But where some cases of a product were branded "Sugar Glen Open Kettle Sugar House Molasses absolutely pure. Highest grade sugar house molasses," and in inconspicuous type across the face of the label in some cases and across the back in others "Compound molasses and corn syrup;" and other cases of the same product was branded "Burro Sugar House Ribbon Cane Molasses," and inconspicuously printed over the face of the label in some cases and across the back in others, "Compound Molasses and Corn Syrup;" and the product called "Sugar Glen" contained 30 percent and the "Burro Sugar" 40 percent of commercial glucose, and the compound contained no substance deleterious or injurious to the health of persons using it, and under the practice of the Department of Agriculture commercial glucose, if properly labeled, could be sold under the name of "corn syrup," the court held that the product was properly labeled.³

"It appears from an investigation conducted by the Board of Food and Drug Inspection that there is a wide variety of opinions with respect to the meaning of the term 'New Orleans molasses.' The evidence at hand shows that 'New Orleans' molasses is generally understood to be a product of Louisiana. It is apparent that the original significance of the term 'New Orleans' molasses as applied to open-kettle drippings or 'bleedings' has disappeared.

"The Food and Drugs Act requires a label to be free from any statement which is false or misleading in any particular. In view of the general understanding of the term 'New Orleans' molasses the board is of the opinion that the term 'New Orleans' should be restricted to molasses produced in Louisiana. In addition, all molasses so labeled may bear the further statement of its quality or grade, namely, 'open kettle,' 'first centrifugal,' 'second centrifugal,' 'black strap'," etc.⁴

¹ N. J. 2.

² N. J. 24.

³ N. J. 270.

⁴ F. I. D. 134.

§ 354. Oats.

A substance branded "White Oats" is misbranded if it contains wheat, barley, or other seeds.¹

§ 354a. Olives.

A product labeled "olives" when the olives are wormy and decayed and contain considerable worms has been condemned as mislabeled.¹

§ 355. Olive Oil.

A substance labeled "Olive Oil" is mislabeled if it contains cotton seed oil.¹ A label was as follows: "La Sicilia—Extra Compound Cotton Seed Oil—Olive Oil." The can contained nothing but olive oil, but the bottle was held to be mislabeled.² Oil can not be labeled "Olio Puro d'Oлива Garantito" when it contains 60 percent of cotton seed oil, for the label contains a statement that it is pure olive oil.³

§ 356. Orangeade Powder.

A product labeled "Orangeade Powder" implies that it is produced from oranges; and if it is not so produced it is falsely labeled.¹

§ 357. Peach Butter.

A product labeled "Peach Butter, made with choice peaches, granulated sugar, apple juice, phosphoric acid. Preserved with one-tenth of one percent of benzoate of sodium,"

¹ N. J. 650; N. J. 620; N. J. 334; 386; N. J. 441; N. J. 453; N. J. 409; N. J. 452; N. J. 582; 472; N. J. 535; N. J. 574; N. J. 759; N. J. 752; N. J. 748; 605; N. J. 565; N. J. 710; N. J. 783; N. J. 819; N. J. 997; N. J. 749.

¹ N. J. 971.

¹ N. J. 654; N. J. 634; N. J. 617; N. J. 133; N. J. 217; N. J. 244; N. J. 247; N. J. 340; N. J. 348; N. J. 360; N. J. 397; N. J.

915; N. J. 916.

² N. J. 783; N. J. 832; N. J. 953. See "Salad Oil."

³ N. J. 997.

¹ N. J. 279.

is mislabeled if it contain glucose and a greater amount of benzoate of sodium than that indicated.¹

§ 358. Pepper.

A substance labeled "Pepper" is mislabeled if it contains olive pits or almond shells;¹ so if it contains cracker crumbs, ground nutshells and fruit pits;² or wheat meal, seed coats and cocoanut shells;³ or pepper shells and dirt;⁴ or a large percentage of leguminous starch;⁵ or sand and ash when labeled "pure pepper;"⁶ or a corn product.⁷

§ 359. Phosphate, Calcium Acid.

Where a product was labeled "C. A. P.," which meant "Calcium Acid Phosphate," but it contained no poisonous or deleterious ingredients; and these initials had been adopted as a trademark; and it appeared that the compound, which was compounded of calcium acid phosphate and corn starch, the mixture containing about thirty-three and one-third percent of the latter, was formerly called "Cream Acid Phosphate," it was held that the article was not mislabeled.¹

§ 360. Pork and Beans.

Pork and beans are food products and come within the provisions of the Food and Drugs Act.¹

§ 361. Preserves—Glucose—Phosphoric Acid.

Preserves labeled as containing 43 percent of glucose when they contain 64 percent are misbranded; and a failure to note on the label 0.16 percent of phosphoric acid is also a misbranding.¹ Labeling a can as "blackberry preserves"

¹ N. J. 592.

⁶ N. J. 297.

¹ N. J. 655.

⁷ N. J. 835.

² N. J. 75; N. J. 164.

¹ N. J. 300.

³ N. J. 120; N. J. 288.

¹ N. J. 39; N. J. 84; N. J. 93;

⁴ N. J. 150.

N. J. 897.

⁵ N. J. 158.

¹ N. J. 703; N. J. 952.

that is filled with "logan preserves" is a misbranding of the can.² To label preserves as containing 25 percent of glucose when they contain 51.31 percent of that article, is to mislabel them.³

§ 362. Raisins.

To label raisins as "Choice California Raisins" when they are not choice raisins, but are composed in part of a filthy and decomposed vegetable substance, is to violate the statute.¹

§ 363. Rice.

Rice labeled "Mikado No. 1 Fancy Japan Rice" is misbranded if it was not raised in Japan.¹ Rice meal was labeled as follows: "Carolina Rice Meal. Protein 11.15, fat 9.25, crude fiber 7.50." An analysis showed it contained only 9.72 protein, 7.69 fat, and crude fiber 9.98. It was held to be mislabeled.²

"Inquiries have been received as to what is the proper branding under the Food and Drugs Act of certain varieties of rice which have come to be known under geographic names. It is well known among the trade that there are current in commerce in the United States varieties of rice grown in Japan and varieties of rice grown within the United States from seed originating in Japan, which are marked and sold as 'Japan Rice' irrespective of origin, and that a variety of rice grown in Mexico is imported as 'Honduras Rice.' The names 'Japan Rice' and 'Honduras Rice,' used without qualification, in the opinion of the board, clearly convey the impression to consumers that the rices are grown in Japan and Honduras, respectively, and if applied to rices not there grown, constitute misbranding within the meaning of section 8 of the Food and Drugs Act, which provides—

² N. J. 701; N. J. 509.

¹ N. J. 316.

³ N. J. 551; N. J. 552; N. J. 553; N. J. 554; N. J. 581; N. J. 952.

¹ N. J. 190.

² N. J. 579.

"That the term "misbranded" as used herein shall apply . . . to any food or drug product which is falsely branded as to the State, Territory, or country in which it is manufactured or produced."

"The labeling of rices which have come to be known under geographical names, and which are not grown in the State or country which the names indicate, is covered by Regulation 19 paragraph (c), reading as follows:

'The use of a geographical name in connection with a food or drug product will not be deemed a misbranding when by reason of long usage it has come to represent a generic term and is used to indicate a style, type, or brand; but in all such cases the State or Territory where any such article is manufactured or produced shall be stated upon the principal label.'

"To meet the requirements of this regulation rices grown within the United States, labeled 'Japan Rice,' should have also plainly stated on the label 'Grown in the United States;' rices grown in Mexico or Louisiana, for example, labeled 'Honduras Rice,' should also have stated plainly on the label 'Grown in Mexico,' or 'Grown in Louisiana,' as the case may be.

"There are also on the market varieties of rice labeled 'Carolina White' and 'Carolina Gold,' which are grown in North and South Carolina, and also in any other States from Carolina seed. The board is of the opinion that the names 'Carolina White' and 'Carolina Gold' by long usage have come to mean particular varieties of rice rather than rice grown in North or South Carolina, and such rices will not be held to be misbranded if plainly labeled 'Carolina White' or 'Carolina Gold,' as the case may be, whether qualified or not, as growers or packers may see fit, by a statement of the name of the locality where the rice is actually grown. On the other hand, if it is desired to designate rices grown from Carolina seed in States other than North and South Carolina as 'Carolina Rice,' there should also be plainly stated on the label the name of the locality where the rice is actually grown, as, for example, 'Carolina Rice, Grown in Arkansas'."

§ 364. Rice, Polishing and Coating.

“It has been represented to the department that it is a very common practice in this country in the preparation of rice for commerce to treat it in the following manner:

‘1. The rough rice is passed through a series of set stones, or shellers, which removes the hull.

‘2. The product is subjected to a series of scouring machines by which the bran and cuticle are removed.

‘3. The rice is passed through a machine that is known as the brush, which removes a portion of the flour, or more commonly known as polish.

‘4. The rice is introduced into a warm revolving drum or cylinder holding as much as 4,000 pounds, and glucose and talc are added in the following manner and in about the following proportion: As the rice is fed into the drums a small proportion of glucose and talc are applied, namely, glucose one one-thousandth and talc one three-thousandth part of the whole. The object of the glucose is to form a coating by means of which a part of the talc is held on the surface of the rice.’

“It is stated that the rice is coated for the following reasons:

1. The coating makes the rice less susceptible to dust and other foreign matter during transportation and storage.

‘2. It is, in a measure, a preventive against the attack of the weevils and worms which are so destructive in warm climates.’

“It has also been represented that in some instances paraffin is used instead of glucose and that rice starch is sometimes used in place of talc for the purpose of finishing rice according to the method described above.

“In submitting these representations it has been asked if the process above described is permitted under the Food and Drugs Act of June 30, 1906. It is not clear to the department that coating rice in this way protects it in any manner from dust. Evidence of an expert character is also on file in the department showing that unpolished rice is no more subject to the ravages of the weevil than the polished article.

“It is the opinion of the department that no coating of any kind can be used in the manner indicated if the product ‘be mixed, colored, powdered, coated, or stained in a man-

ner whereby damage or inferiority is concealed.' In each case whether or not such a result be secured is a question of fact to be decided by the evidence.

"It is held by the department that rice treated in the manner indicated above with glucose and starch should be labeled in all cases with the name of the extraneous substances, as

"COATED WITH GLUCOSE AND STARCH.

"In such declarations all of the food substances used for coating should be mentioned. Any coloring matter or other substances that may be employed to change the tint of the rice should be declared on the label.

"The question of the wholesomeness of paraffin, talc, or other nonfood substances used is to be construed in such a way as to protect the health of those most susceptible to their influences. Rice is a diet often prescribed for those suffering from impaired digestion. The use of paraffin in such cases is at least of questionable propriety, and in the opinion of the department it should be excluded from food products. Under the fifth provision of foods, section 7 of the Food and Drugs Act, June 30, 1906, and under Regulation 14 the use of talc is permitted, provided that each package be plainly labeled with the name of this preservative and the proper directions for removal be given."¹ A product consisting in part of rice and in part of two other substances known as glucose and talc can not be labeled rice.²

§ 365. Rococola.

A "soft drink" called "Rococola" was found to contain caffeine and cocaine. Nothing was said of this fact on the label. It was held that the product was mislabeled.¹

§ 366. Rye.

Rye flour branded as "Rye Flour," but having wheat flour in it is misbranded.¹

¹ F. I. D. 67.

² N. J. 1030.

¹ N. J. 466.

¹ N. J. 69.

§ 367. Sago and Tapioca.

"It has come to the attention of the Board of Food and Drug Inspection that there exists among the trade in various parts of the United States a very general misunderstanding with respect to sago and small pearl tapioca. Sago is prepared from the starch obtained from the pith found in the stem of several species of palm trees, natives of the East Indies, and tapioca is prepared by heating in a moist state the starch made from the root of the cassava or tapioca plant, which is indigenous to certain South American countries. Both products ordinarily reach the consumer in granulated form and are designated as 'pearl sago' and 'pearl tapioca,' respectively. While 'pearl sago' and 'pearl tapioca' are separate and distinct articles of commerce, each resembles the other closely in appearance, and fine pearl tapioca frequently has been labeled and sold as sago.

"Under the Food and Drugs Act of June 30, 1906, articles of food are misbranded if the labels or packages contain statements which are false or misleading, or if particular articles are imitations of or offered for sale under the distinctive names of other articles. In the opinion of the board, the name 'sago,' or 'pearl sago,' without qualification, means the product obtained from the pith of East Indian palm trees, and starch products of different origin will be held to be misbranded under the Act if labeled or offered for sale as 'sago,' 'pearl sago,' etc. The prepared starch product derived from the root of the cassava plant is tapioca, and should be sold and labeled as such.

"There is also on the market an imitation sago made from potato starch. Imitation food products are misbranded under the Act unless they are labeled so as to indicate plainly that they are imitation products and unless the word 'imitation' is plainly stated on the packages in which imitation products are offered for sale. Potato or other starch prepared to resemble pearl sago, therefore, should be labeled, for example, 'Imitation sago. Made from potato starch,' the words 'imitation' and 'Made from potato starch' being de-

clared as plainly and conspicuously as the word 'sago.' The word 'Imitation' must appear on the label, but an equivalent expression may be substituted for 'Made from potato starch,' which will indicate unmistakably that the product is not made from the pith of East Indian palm trees, but is derived from a different source."¹

§ 368. Salad Oil.

Oil was labeled as follows: "Olio per Insalata Sopraffine Vival Brand Cotton Salad Oil Extra Qualita." The Italian thus used means "Salad Oil, superfine, extra quality." It was held that the oil was mislabeled. The court charged the jury that it was a "notorious fact salad oil *prima facie* means olive oil," and this was held not error, although the defendant was permitted to show if he could that "it means something else because of recent events which have perhaps rendered olive oil more difficult to obtain or that other food elements have come to be known as salad oil." Proof to that effect, however, was not introduced.¹ In one case the court instructed the jury as follows, resulting in a verdict of guilty:

"Gentlemen of the Jury, this is another case of so-called misbranding of things sent from New York State into another State. It is conceded by the defendant that the article in question is cottonseed oil; that it contains five percent of olive oil and ninety-five percent of cottonseed oil, and the government claims that the branding of the article, or branding on the container, the words 'Olio Sopraffino Savoia Brand Salad Oil,' deceives the public and leads the ordinary purchaser to believe that he was getting olive oil of a foreign production when in fact he was getting a spurious article.

"Now, the witness Eginton, who gave testimony for the government, substantially testified, if I recall his testimony that salad oil is commonly known in the trade as olive oil, and other witnesses for the government have testified that by the mere words 'Olio Sopraffino Savoia Brand Salad Oil,' Italians or persons of Italian birth, believe that olive oil is meant by such designation. Now, the term olive oil has a dictionary definition, and Judge Lacombe not long since had occasion to examine into a similar question that was presented to him, and upon looking at the dictionaries as

¹ F. I. D. 128.

¹ N. J. 473. See Olive Oil, § 355.

to its definitions, found that the Century dictionary, Worcester's dictionary, and the Encyclopedia all defined salad oil as olive oil. Webster does not give any definition. So that the dictionary definition apparently defines salad oil as synonymous with olive oil. Now while that is conceded to be true by the defendant, it claims nevertheless that this term 'salad oil' in connection with cottonseed oil has received a wide and distinctive designation; that the dictionary definition is not universal in that the public generally, the buying public generally, understand by the term superimposed or branded upon this can the real meaning, namely, a production of cottonseed oil and not of genuine olive oil; that in fact the term in trade and commerce has come to mean other oils than salad oil. If you believe this to be the fact, that consumers, the public generally, or persons generally who use this commodity would not be misled by this inscription on the container and that the defendant's commodity is not misbranded by the use of the words 'Olio Sopraffino Savoia Brand Salad Oil,' and unless you believe the other words and that the style of the can misleads the user, your verdict should be one of acquittal. On the other hand, if you believe from the testimony of the government and the manner in which this article is put upon the market that people who use this commodity or the public generally are led to believe by reason of the phraseology to which I have already referred and the configuration of the can, that they were actually buying olive oil, whereas in truth and in fact they were only receiving cotton oil or a spurious oil, then your verdict should be in favor of the government. If, therefore, the term 'salad oil' in connection with the other words on the can requires a distinctive trade designation, the defendant is not guilty of misbranding. Upon that subject the defendant has called a number of witnesses, one of them at least a dealer in cotton oil, and he testifies that cotton oil is very largely used in this country, and that it is used as a substitute for olive oil. Perhaps this is some evidence that should be taken into consideration, and yet it would seem to have no particular bearing on the question as to whether the public generally, the people who use this commodity, are misled or not. As to whether the public generally is misled by the article must be taken by you from the evidence as to how the user and consumer of the article views the can and inscription, and upon that subject there is some contradictory testimony, and it is for you to determine it.

"This is a criminal case. The government is required to substantiate the charge contained in the information beyond a reasonable doubt, and likewise the defendant is presumed to be innocent until the contrary is established. Of course, you will bear in mind that Congress in enacting the Pure Food and Drugs Act had in mind the protection of the public, and in mind the punishment of persons who misbrand their merchantable or vendable articles.

"As I have already indicated, it is not claimed that cotton oil is deleterious or harmful to the health of the user, but persons who go into the

market to buy olive oil should not have foisted upon them cotton oil. So that these are matters you have in mind. I don't think I need say anything further. I think you are thoroughly familiar with all the facts, and that you will take the matter and return a verdict as your judgment dictates. Perhaps you should bear in mind that the can contains other words than those I have specifically mentioned. On the lower corner is found the word 'Compound' in parentheses and the 'Winter Pressed Cotton Salad Oil Flavored with Pure Italian Oil.' Then with relation to this inscription, added to the one I have already spoken of, the government claims it is not sufficient and is misleading, and is not a sufficient warning to the purchaser as to the character of the commodity that he is buying."²

To misbrand an adulterated olive oil as "olive oil" is to misbrand the article.³

§ 369. Salt.

Sacks of salt were labeled "Granulated Liverpool Dairy Salt. Factory filled. Manufactured by Inland Crystal Salt Co., Salt Lake City," with a stamp or branded picture of a crown above said label, with the words "Liverpool Dairy Salt" printed in large and more prominent letters than the other words in the brand. This was held misbranded, because it led to the belief in the purchaser's mind that the salt was from Liverpool, England.¹

§ 370. Sardines.

"Many inquiries have been made of this department respecting the extent to which the term 'sardine' can be used in food products entering into foreign or interstate commerce. The question of the proper labeling of fish of this kind was submitted by the department to the Department of Commerce and Labor, Bureau of Fisheries. After reviewing the nomenclature and trade practices the Department of Commerce and Labor reached the following conclusion:

'Commercially the name sardine has come to signify any small, canned, clupeoid fish; and the methods of preparation are so various that it is impossible to establish any absolute standard of quality. It appears to this

² N. J. 832. See Olive Oil, § 355.

¹ N. J. 280.

³ N. J. 953.

department that the purposes of the pure food law will be carried out and the public fully protected if all sardines bear labels showing the place where produced and the nature of the ingredients used in preserving or flavoring the fish.'

"In harmony with the opinion of the experts of the Bureau of Fisheries, the Department of Agriculture holds that the term 'sardine' may be applied to any small fish described above, and that the name 'sardine' should be accompanied with the name of the country or State in which the fish are taken and prepared, and with a statement of the nature of the ingredients used in preserving or flavoring the fish.

"It is held that a small fish of the clupeoid family, caught upon or near the shores of and packed in oil in Norway, or smoked and packed in oil, is properly labeled with the phrase 'Norwegian Sardines in Oil,' or 'Norwegian Smoked Sardines in Oil,' the nature of the oil being designated. In like manner a small fish of the clupeoid family caught upon or near the shores of and packed in France may be called 'French Sardines in Oil,' the nature of the oil being specified. Following the same practice, a fish of the clupeoid family caught on or near the shores of and packed in the United States may be labeled 'American Sardines Packed in Oil,' or 'Maine Sardines Packed in Oil,' or be given some similar appellation, the nature of the oil being stated. It is suggested that the name of the particular fish to which the term sardine is to be applied should also be placed upon the label—for example, 'Pilchard,' 'Herring,' etc.'"

§ 371. Syrup.

To brand a syrup as "Cane Syrup" in which there is glucose in an amount over 14 percent than the amount specified on the label, is to mislabel it.¹ To label a product as "Topmost Cane and Maple Syrup. This syrup is composed of the following ingredients and none other: Cane syrup 60 percent, maple syrup 40 percent," when it contains very little maple syrup is to mislabel it.² So to label a product as

¹ F. I. D. 64. See Fish, § 329.

² N. J. 271; N. J. 458; N. J. 469.

¹ N. J. 106; N. J. 127.

"Aunt Jemima's Sugar Cream, a Blend of Rock Candy and Maple Syrup Cream," is to mislabel it when it contains 12.9 percent of glucose. Such a product is offered for sale under the distinctive name of another product.³

§ 372. Syrups, Mixtures of Cane and Maple.

"The director of the agricultural station at Orono, Maine, in a recent letter made the following statement:

"There are in Maine many syrups which are labeled something like this: 'A Fancy Quality Syrup Made from Pure Maple and White Sugar.' Many of these syrups carry but little maple, one company saying that in a syrup analogous to this they put ninety percent of cane sugar and ten percent of maple.'

"When both maple and cane sugars are used in the production of syrup the label should be varied according to the relative proportion of the ingredients. The name of the sugar present in excess of 50 percent of the total sugar content should be given the greater prominence on the label; that is, it should be given first. For example, a syrup the sugars of which consist of 51 percent cane sugar and 49 percent maple sugar would be properly branded as 'Syrup Made from Cane and Maple Sugar,' or as 'Cane and Maple Syrup.' The terms 'maple sugar' and 'maple syrup' may only be used on the label as part of the name when those substances are present in substantial quantities as ingredients. They should not appear on the label as part of the name when only a small quantity of those substances is used to give a maple flavor to the product. A cane syrup containing only enough maple syrup or maple sugar to give a maple flavor is properly labeled as 'Cane Syrup, Maple Flavor' or 'Cane Syrup Flavored with Maple.'

"Whenever it is necessary to declare cane sugar (sucrose) on a label it should be declared as cane sugar and not as white sugar."¹

³ N. J. 325.

¹ F. I. D. 75. See also N. J. 1015 and Section 349.

§ 372a. Soda Water Syrup Cola.

A substance labeled "Soda Water Syrup Cola" is misbranded if it contains coca leaf alkaloids, including cocaine and a minute quantity of caffeine.¹

§ 373. Stearin.

Stearin is not admitted into the United States unless accompanied by a certificate, in the prescribed form, showing its freedom from disease, as in the case of meats and meat food products of cattle, sheep, swine and goats.¹ Meat products of horses and dogs are not allowed entry into the United States.²

§ 374. Stock and Poultry Feed.

"This department has frequently received inquiries in regard to the labeling of bran, of which the following is a fair sample:

'Can the screenings of wheat, consisting principally of shrunken seed, etc., be put in the bran and it still be called bran, etc.'

"Since the above is clearly in violation of those provisions of the law requiring that a food product be true to label, the department is of the opinion that it will be necessary to label such a mixture as 'Bran and Screenings.'

"It has recently come to the attention of the department that a number of the cattle and poultry foods sold on the American market contain enough poisonous weed seeds, such as corn cockle and jimson weed (Jamestown weed), to have a more or less toxic effect on poultry, cattle, etc. Poultry and cattle foods which contain poisonous weed seeds in appreciable quantities will be considered as adulterated in accordance with those provisions of the Food and Drugs Act, June 30, 1906, forbidding the presence of poisonous or deleterious ingredients.

¹ N. J. 1031.

¹ F. I. D. 116, revoking so much

of F. I. D. 74 as permits their importation without a certificate.

² F. I. D. 74.

"The department has been asked by the manufacturers of medicinal mixtures for poultry, cattle, etc., whether such mixtures may, under the law, be labeled respectively as cattle and poultry foods. It is thought, first, that the words 'cattle food' or 'poultry food' should apply to cattle or poultry foods which are not mixed with any condimental or medicinal substance or substances; second, that mixtures of cattle and poultry food materials, with small quantities of condiments, such as anise seed, ginger, capsicum, etc., should be labeled as 'Condimental Cattle Food,' or 'Condimental Poultry Food;' and third, that mixtures of cattle-food materials with medicinal substances, such as arsenic, sulphate of iron (copperas), etc., should not be labeled as foods, but as medicines or remedies. For example, under the latter ruling, a cattle food mixed with medicinal substances, such as arsenic, copperas, etc., should be plainly labeled as a remedy or medicine, so as to differentiate clearly such a substance from a cattle food material is unmixed with medicinal agents."¹

§ 375. Succotash.

A manufacturer writes as follows:

"We respectfully call your attention to the canned article known as succotash, which is composed of green sweet corn and lima beans. Both dried and green beans are used. The question to which we desire an answer is this: Is it sufficient to call the product "Succotash"?"

"The word 'succotash,' if used without qualification, is understood to imply that the product designated is composed of green sweet corn and green beans. If soaked beans or soaked corn (i. e., dried beans or corn softened in water) are employed, the name should be accompanied by declaration of that fact, such declaration to be in type not smaller than eight point (brevier) capitals."¹

¹ F. I. D. 90. See Feed, Section N. J. 868 ("alaforine," and "Truebloods Honest Queen Feed").

¹ F. I. D. 71.

§ 376. Tomatoes.

Tomatoes packed in Maryland can not be labeled "Delaware Tomatoes."¹ To brand a product "Tomatoes" which is a filthy, decomposed and putrid vegetable substance, and contains salts of tin is to misbrand it.² To brand a product as "Solid Meat Tomatoes First Quality" which contains a large amount of free liquid is to misbrand it.³ And that is also true if it be not "first quality."⁴

§ 377. Tomato Ketchup.

A tomato ketchup labeled as containing "one-tenth of one percent of benzoate of soda" is mislabeled if it contains 0.205 percent of the product.¹ A tomato ketchup bore this label: "Navy Brand Catsup, prepared with one-tenth of one percent of benzoate of sodium." "Notice: This Catsup is superior on account of its Fine Zest and Fine Tomato Flavor." "Made from choice ripe tomatoes, granulated sugar, and selected high grade spices, grain vinegar." It was made from filthy, decomposed and putrid vegetable substance and from tomato pulp screened from peelings and cores. It was held that it was mislabeled.² A like result was reached when the label was "Tomato Catsup Prepared with one-tenth of one percent Benzoate of Soda," it being construed as meaning that it was prepared from clean sound pulp of fresh, ripe tomatoes.³ If glucose be used in catsup, it must be so stated in the label.⁴ It tomato catsup be labeled as containing one percent of benzoate of soda when it contains more than that, it is mislabeled.⁵ So failure to state on the label that it contains two percent of benzoate of soda when that is the fact, is to mislabel it.⁶

¹ N. J. 251.

² N. J. 555; N. J. 875.

³ N. J. 369.

⁴ N. J. 369.

⁵ N. J. 111.

⁶ N. J. 156; N. J. 79; N. J. 599;

N. J. 604; N. J. 1034; N. J. 827;
N. J. 904.

³ N. J. 388; N. J. 767.

⁴ N. J. 474.

⁵ N. J. 1004.

⁶ N. J. 999.

§ 378. Tomato Paste.

A product was labeled "Tomato Paste, Conserva Di Tomato Rossa P. R.—this article guaranteed to be made from the best quality of red ripe tomatoes and to contain no artificial coloring." It was found to contain 500,000,000 bacteria per gram, 260 yeast spores per one-sixtieth milligram, and mold filaments in 72 percent of the microscopic fields examined. It was held that the product, called "Tomato Paste," was mislabeled.¹

§ 378a. Turmeric.

To label a product as "powdered turmeric" leads the purchaser to believe it is pure turmeric; and if it contains wheat starch or wheat flour and 10.74 percent of calcium sulphate, it is misbranded.²

§ 378b. Vani-Kola Compound Syrup.

A product labeled "Vani-Kola Compound," and containing 0.14 percent caffeine and coca leaf alkaloids, including cocaine, is misbranded.¹

§ 379. Vinegar.

A product labeled as "Cider Vinegar" is mislabeled if it contains a mixture of distilled vinegar and a product high in reducing sugars.¹ So a barrel labeled "cider vinegar" is mislabeled if it contain a mixture or compound prepared from a diluted solution of acetic acid and unfermented apple juice, but showing some vinegar.² The Department of Agriculture holds that vinegar or cider vinegar is the product made by the alcoholic and subsequent acetous fermentation

¹ N. J. 767; N. J. 973.

² N. J. 996.

¹ N. J. 935.

¹ N. J. 690; N. J. 687; N. J. 685;
N. J. 681; N. J. 679; N. J. 678;
N. J. 720; N. J. 1007; N. J. 1023;

N. J. 917; N. J. 910; N. J. 927;

N. J. 844; N. J. 967; N. J. 985.

² N. J. 688; N. J. 653; N. J.

654; N. J. 616; N. J. 1007; N. J.
844.

of the juice of apples and contains less than four grams of acetic acid in 100 cubic centimeters. The department therefore held that vinegar showing this analysis:

Solids	0.428
Nonsugar solids328
Reducing sugar invert.....	.1008
Polarization direct9
Ash076
Ash soluble in water.....	.048
Ash insoluble in water.....	.028
Alk. insol. ash, cc N. 10 acid 100 cc.....	8.8
Sol. phos. acid, mgs per 100 cc.....	1.85
Insol. phos. acid, mgs per 100 cc.....	1.36
Acid, as acetic.....	3.24
Volatile acid, as acetic.....	3.22
Fixed acid, as malic.....	.020
Lead precipitate	None.
Color removed by fuller's earth.....	All.
Ratio of ash to nonsugar solids.....	4.31

was misbranded.³ A liquid branded "46 Sugar Vinegar" is misbranded if it be a compound of part sugar vinegar with part spirit vinegar, or distilled vinegar.⁴ To brand a liquid "Pure Apple Cider Vinegar" is to misbrand it when it contains dilute acetic acid and other substances containing reducing sugars.⁵ Vinegar made in Baltimore can not be branded "Old Southern Syrup Vinegar, Spence-Nunnamaker Co., Richmond, Va."⁶ Vinegar can not be branded "White Wine Vinegar" if it contains a dilute solution of acetic acid, or is a distilled vinegar.⁷ Vinegar in which there is water can not be branded "Pure Distilled Spirit Vinegar."⁸ A product can not be labeled "Vinegar" if it contain dilute acid and a foreign material high in reducing sugars and is

³ N. J. 169; N. J. 200; N. J. 187; N. J. 289; N. J. 318; N. J. 570; N. J. 584; N. J. 593; N. J. 597; N. J. 73; N. J. 207; N. J. 240; N. J. 243; N. J. 274; N. J. 282; N. J. 398; N. J. 304; N. J. 985; N. J. 967; N. J. 977; N. J. 844.

⁴ N. J. 195.

⁵ N. J. 286; N. J. 232; N. J. 373; N. J. 399; N. J. 910; N. J. 1023.

⁶ N. J. 61; N. J. 62; N. J. 398.

⁷ N. J. 197; N. J. 278.

⁸ N. J. 199; N. J. 917; N. J. 977.

artificially colored.⁹ So a product branded as "vinegar" which is composed of the following substances is misbranded:

Reducing sugars (grams per 100 cc).....	.1040
Solids (grams per 100 cc).....	.370
Ash (grams per 100 cc).....	.0264
Total acids (grams per 100 cc).....	10.83
Fixed acids (grams per 100 cc).....	.01
Volatile acids (grams per 100 cc).....	10.82
Alkalinity of ash (cc N/10 solution per 100 cc).....	1.40
Total phosphoric acid (mg P_2O_5 per 100 cc).....	2.00
Lead number (no precipitate or turbidity with lead acetate)	0.00
Color removed by fuller's earth (percent).....	82.00 ¹⁰
Polarization ("V.)	0.7

So where the analysis shows the following results:

Solids (grams per 100 cc).....	0.25
Acid, as acetic (grams per 100 cc).....	3.69
Color removed by fuller's earth.....	80.00 ¹¹

A product was labeled "Saratoga brand vinegar a blend of pure boiled cider and distilled vinegar. We guarantee the vinegar sold under our brand to comply with the requirements of the national and State food laws." The words "pure boiled apple cider" were in smaller type and below the words "Saratoga Brand Vinegar," and in the third line, in large print, were the words "Distilled Vinegar." No punctuation marks were used, and it was contended that the words "A Blend of Pure Boiled Apple Cider and Distilled Vinegar" naturally applied to two brands of vinegar that were blended, and the words "Pure Boiled Apple Cider" were merely descriptive of one of such ingredients. But the court held that the term "blend" as displayed on the label, was an assurance to the public that the mixture consisted of like substances, and was an assurance that the "Saratoga Brand Vinegar" consisted of two substances, that is, distilled vinegar and a vinegar derived from apple cider, and in that regard the label was false and misleading.¹²

⁹ N. J. 289; N. J. 394; N. J.

¹¹ N. J. 73.

561; N. J. 927; N. J. 1007.

¹⁰ N. J. 23.

¹² *United States v. Ten Barrels of Vinegar*, 186 Fed. 390.

§ 380. Water.

Water was labeled "Basic Lithia Water, natural carbonic spring water, Basic, Virginia. Uric acid solvent. A pure, light, freestone, lithia water. Invaluable as a constant and exclusive drinking water, and in the prevention and cure of rheumatism, gout, malaria, typhoid fever and diseases of the kidneys, liver, blood and nerves." On analysis it was found that the water did not contain enough lithia in 2,000 grams to give a spectroscopic test; the amount of lithia present was not weighable, and if present in a quantity appreciable at all, it was estimated to be less than one-hundredth part per million. According to the United States Pharmacopoeia a dose of lithium is seven and one-half grains, and on this basis it would require many thousand liters of this water to contain a medicinal dose. The water evidently did not contain a sufficient quantity or consistency of lithia to make it of value for medicinal purposes. It was therefore held that the water was mislabeled.¹ A like decision was made where the analysis showed the following statement was untrue: "Tuckahoe Lithia Water," and "This water is a sure solvent for calculi, either of the kidneys or liver, especially indicated in all diseases due to uric acid diathesis, such as gout, rheumatism, gravel stone, incipient diabetes, Bright's disease, inflamed bladder, eczema, stomach, nervous and malarial disorders."² Water was labeled as follows: "Sussus Wasser. A Concentrated Saline Purgative Water. Should crystals (due to concentration) form, immerse bottle in warm water. Formulae:—Gms in liter Natrium Sulph. 55.03, Natrium Phos. 28.60, Natrium Chlor. 0.08, Alumen chlor. Trace; Dosage, wine glassful early in the morning." The words "Sussus Wasser" indicated that the water was a German natural water when it was not either a German water nor a natural one, but was an artificial water. It was held to be misbranded.³ A water was labeled "Londonderry Lithia Spring Water Co. For Rheumatism, Neuralgia, Dyspepsia,

¹ N. J. 59; N. J. 94; N. J. 1032;
N. J. 924; N. J. 968.

² N. J. 424.
³ N. J. 375.

Eczema, Malarial Poisoning, Gout, Gravel, Bright's Disease, Diabetes, Dropsy, and all diseases of the Kidneys and Bladder," followed by directions when to take and the quantity. Another quantity had the words on the label "Carbonated" and "Artificially Carbonated." On analysis it was found that there was no weighable amount of lithium in 2,000 c.c., but only a faint spectroscopic trace, insufficient to give the therapeutic action of lithia when a reasonable quantity of water was consumed. The second quantity contained sodium chloride and sodium bicarbonate, the presence of which was not stated on the label. It was held that they were misbranded.⁴ A water was labeled as follows: "Foster and Foster, Props., Fairchild, Wis. Original California water of life, formerly known as Isham's Sweet Water Springs, San Miguel Mts., San Diego, Calif. The most salubrious spot on earth. Just as it flows from nature's laboratory. Famous for its miraculous power to destroy diseases and actually rejuvenates humanity by dissolving and evacuating calcareous old age matter and microbes. The worst form of kidney, stomach, blood and skin diseases yield to its marvelous power. Cures rheumatism, Bright's disease, diabetes, dropsy, gallstones, acute dyspepsia, insomnia, and gives new life. Makes the blood pure and postpones old age. No other water performs such wonderful cures. Requires less than one-half the amount of other medicinal waters to derive the desired results. Some physicians have specially requested that the precipitation, if any occurs, be saved for their own use as it is pronounced by chemists to be iron and silica and in no manner is the value of the water lessened or deteriorated." Analysis of samples of this product was made by the Bureau of Chemistry, United States Department of Agriculture, and it was found to contain no ingredients possessing therapeutic properties superior to those found in the average spring water or in any sense justifying the above claims of the shipper as to its curative qualities. The water was condemned.⁵

⁴N. J. 822; United States v. Morgan, 181 Fed. 587.

⁵N. J. 830; N. J. 1032.
It must be borne in mind, how-

§ 381. Water, Table and Medicinal.

“The department has received many letters from various water manufacturers and mineral water dealers asking which waters it will be necessary to label as ‘artificial’ or ‘imitation.’ It is thought that all manufactured waters should be labeled as either artificial or imitation, the choice of words being left to the manufacturer, and applying to waters contrived by human art and not made in imitation of a natural water, as well as to those so contrived and made in imitation of a natural water. A water which is designated by some name alone, without any characterizing adjective to tell whether it is natural, imitation, or artificial, will be considered a natural water. It is suggested that the words ‘artificial’ or ‘imitation’ be in as large type as the name of the water in question, and on a uniform background.

“All waters which, though natural in the beginning, have anything added to them or abstracted from them after they come from source, should either be labeled as ‘artificial’ or should be labeled as to indicate that certain constituents have been added to or extracted from them. It is suggested that the word ‘artificial’ or the above explanation, as the case may be, should appear in as large type as the name of the water in question and on a uniform background.

“The following examples are explanatory of the above principles. If lithia be added to a natural water, the water should either be labeled as ‘artificial lithia water,’ as ‘water artificially lithiated,’ or as ‘water treated with lithia.’ Again, if carbon dioxid be added to a natural water, whether the carbon dioxid be of the manufactured variety or collected from the spring itself, the water should either be labeled as ‘artificially carbonated water,’ ‘water artificially carbonated,’ ‘water treated with carbon dioxid,’ or ‘contains added carbon dioxid.’

ever, that the Supreme Court has held since these decisions were made that the Pure Food and Drugs Act does not cover statements concerning the curative value of a

drug or medicine. *United States v. Johnson*, 31 Sup. Ct. 627.

To brand a water “Royal Lithia Water” when it does not contain lithium is to misbrand it. *N. J.* 1032.

"No water should be labeled as a natural water unless it be in the same condition as at source, without additions or abstractions of any substance or substances.

"No water should be labeled as 'medicinal water' unless it contains one or more constituents in sufficient amounts to have a therapeutic effect from these constituents when a reasonable quantity of the water is consumed. No water should be named after a single constituent unless it contains such constituent in sufficient amounts to have a therapeutic effect when a reasonable amount of the water is consumed.

"No manufactured water should bear upon the label any design or device that would lead the consumer to believe that the water is a natural one. Among such designs may be mentioned pictures of springs, fountains, woodland streams, etc.

"No water should be characterized by a geographical name which gives a false or misleading idea in regard to the composition of said water. For example, it would not be correct to designate a water as 'Lithia water' merely because the water came from Lithia, Fla., or Lithia, Mass.

"Manufactured water may be named after a natural water in case the words 'imitation' or 'artificial' are used, but such manufactured waters must clearly resemble in chemical composition the natural waters after which they are named.

"In accordance with Regulation 19 (c) and (d), no natural American spring water should be named after a foreign spring, unless the name of the foreign spring has become generic and indicative of the character of the water, except to indicate a type or style, and then only when so qualified that it could not be offered for sale under the name of the foreign spring. In these cases, the State or Territory where the spring is situated should be stated on the principal label.

"Inasmuch as mineral waters are largely purchased because of their supposed freedom from contamination, any showing such contamination will be considered as adulterated and therefore in violation of the Food and Drugs Act."¹

¹ F. I. D. 94. Impure "Ozone Vichy Water." N. J. 876.

§ 382. Whey.

Whey, containing 17.28 percent of water, branded as "butter," is misbranded.¹

§ 383. Whisky.

"Under the Food and Drugs Act of June 30, 1906, all unmixed distilled spirits from grain, colored and flavored with harmless color and flavor, in the customary ways, either by the charred barrel process, or by the addition of caramel and harmless flavor, if of potable strength and not less than 80° proof, are entitled to the name whisky without qualification. If the proof be less than 80°, i. e., if more water be added, the actual proof must be stated upon the label and this requirement applies as well to blends and compounds of whisky.

"Whiskies of the same or different kinds, i. e., straight whisky, rectified whisky, redistilled whisky and neutral spirits whisky are like substances and mixtures of such whiskies, with or without harmless color or flavor used for purposes of coloring and flavoring only, are blends under the law and must be so labeled. In labeling blends the Act requires two things to be stated upon the label to bring the blended product within the exception provided by the statute: First, the blend must be labeled, branded or tagged so as to plainly indicate that it is a blend, in other words that it is composed of two or more like substances, which in the case of whisky must each be of itself a whisky, and, second, the word 'blend' must be plainly stated upon the package in which the mixture is offered for sale. A mixture of whiskies, therefore, with or without harmless coloring or flavoring, used for coloring and flavoring only, is correctly labeled 'Kerwan Whisky. A Blend of Whiskies.'

"Since the term whisky is restricted to distillates from grain, and distillates from other sources are unlike substances to distillates from grain, such distillates from other sources without admixture with grain distillates are mis-

¹ N. J. 721.

branded if labeled whisky without qualification, or as a blend of whiskies. However, mixtures of whisky, with a potable alcoholic distillate from sources other than grain, such as cane, fruit or vegetables, are not misbranded if labeled compound whisky, provided the following requirements of the law are complied with: First, that the product shall be labeled, branded and tagged so as to plainly indicate that it is a compound, i. e., not a mixture of like substances, in this case whiskies; and, second, that the word 'compound' is plainly stated upon the package in which the mixture is offered for sale. For example, a mixture of whisky, in quantity sufficient to dominate the character of the mixture, with a potable alcoholic distillate from sources other than grain and including harmless color and flavor is correctly labeled 'Kerwan Whisky. A compound of whisky and cane distillate.' Unmixed potable alcoholic distillates from sources other than grain, with or without harmless color or flavor, are not misbranded if labeled 'Imitation Whisky.'

"When an essence or oil is added to a distillate of grain, which without such addition is entitled to the name whisky, and the effect of such addition is to produce a product which simulates a whisky of another kind different from the kind of whisky to which the essence is added, the mixture is an imitation of the particular kind of whisky which is simulated, e. g., if rye essence be added to a highly rectified distillate of corn, the mixture is misbranded if labeled rye whisky. Such a mixture is not misbranded if labeled 'Whisky—Imitation Rye.'

"Nothing in the Food and Drugs Act inhibits any truthful statement upon the label of any product subject to its terms, such as the particular kind or kinds of whisky, vended as whisky or as blends or compounds thereof, but when descriptive matter, qualifying the name of whisky, is placed upon the label, it must be strictly true, and not misleading in any particular. The law makes no allowance for seller's praise upon the label, if false or misleading, and the product is misbranded if a false or misleading statement be made upon one part of the label and the truth about the product

be stated upon another part. Similarly a product is misbranded if the label is false or misleading through the use of a trademarked statement, design or device. The fact that a phrase, design or device is registered in the U. S. Patent Office gives no license for its deceptive use. All descriptive matter qualifying or particularizing the kind of whisky, whether volunteered or required by the law to be stated, as in the case of blends and compounds, must be given due prominence as compared with the size of type and the background in which the name of the whisky appears, so that the label as a whole shall not be misleading in any particular.

"Food Inspection Decisions 45, 65, 95 and 98, and all rulings in conflict herewith, are hereby revoked."¹

"At the instance of certain parties in interest we have considered the suggestion for a modification of the rules embodied in Food Inspection Decision No. 113. The suggestion was that mixtures of whisky with a potable alcohol distillate from sources other than grain, such as cane, fruit or vegetables, are not misbranded if labeled 'a blend of whisky and neutral spirit.' After exhaustive consideration we have concluded that such a change would be in conflict with the controlling reason of the rule itself.

"It has also been suggested that the term 'blend' might be employed under the circumstances given if the neutral spirit disclosed its origin by the designation 'neutral molasses spirit,' or other like terms. While a modification in that form might protect the public against deception or misunderstanding, we are nevertheless of the opinion that such a modification would still be in conflict with the fundamental principle adopted in the President's opinion and in Food Inspection Decision No. 113. In our opinion such a combination, if it is to be designated according to the terms of the law, would be a compound, and not a blend, and if either term is to be employed the former is the only one that is permissible.

¹ F. I. D. 113.

"Our conclusion accordingly is that we must decline to modify the decision heretofore adopted in any respect."²

To brand a whisky as "Prairie Flower Whisky" is to represent it as a straight whisky, and if it contains a rectified product combined with grain distillates it is misbranded.³

§ 384. Whisky, Opinion of the Attorney General on Blending.

On April 10, 1907, the Attorney General of the United States gave the President the following opinion on the blending of whiskies, which the then President, Roosevelt, approved:

"The President.

"Sir: In accordance with your instructions, I have examined the papers referred to me by you, at the suggestion of the Secretary of Agriculture, and herewith submit you my opinion on certain questions which appear from said papers to have arisen in connection with the labeling or branding of different kinds of spirit, claimed by their manufacturers

² F. I. D. 118.

³ N. J. 349; N. J. 353; N. J. 361; N. J. 350; N. J. 595.

Revised Statutes, § 3244, in defining rectifiers, includes "every person, who, without rectifying, purifying or refining distilled spirits, shall, by mixing such spirits, wine or other liquor with any materials manufacture any spurious imitations or compound liquors for sale under the name of whisky, brandy . . . or any other name." In view of this statutory recognition of the manufacture of "imitation whisky," and the process of manufacture, it has been held that the regulation promulgated by the Commissioners of Internal Revenue, May 5, 1908, for the guidance of

officers and employes of the Department of Internal Revenue, which directs that "alcohol," commercial alcohol or high wines which have been manipulated by the aid of artificial colors or extracts, or otherwise, so as to resemble some particular kind of potable spirits, will be marked with the name of such spirits preceded by the word "imitation"; for example, "imitation whisky" is a proper and a reasonable regulation, having in view the provisions of the food and drugs Act, notwithstanding the fact that such compounds may have been previously sold in the trade under the name of the liquors they imitate. *Woolner & Co. v. Rennick*, 170 Fed. 662.

or proprietors to be entitled to the name of 'Whisky,' with or without qualifying words. In addition to the papers referred to me by you, I have received and considered a number of other papers submitted to me by various individuals, including Messrs. Hemphill and Worthington and Mr. W. M. Hough, as counsel for certain distillers and rectifiers interested in the questions under consideration, and I have personally gathered some further information which seemed to me material in view of the character of the questions involved.

"These questions have arisen in the construction of section 8 of the Act approved June 30, 1906, entitled:

" 'An Act for preventing the manufacture, sale, or transportation of adulterated or misbranded or poisonous or deleterious foods, drugs, medicines, and liquors, and for regulating traffic therein, and for other purposes,' and generally known as 'The pure food law.' The portion of that law bearing upon the points in dispute is section 8, which, so far as material, is as follows:

" 'Sec. 8. That the term "misbranded," as used herein, shall apply to all drugs, or articles of food, or articles which enter into the composition of food, the package or label of which shall bear any statement, design, or device regarding such article, or the ingredients or substances contained therein, which shall be false or misleading in any particular. . . . That for the purpose of this Act an article shall also be deemed to be misbranded: . . . In the case of food: First. If it be an imitation of or offered for sale under the distinctive name of another article. . . . Fourth. If the package containing it or its label shall bear any statement, design, or device regarding the ingredients or the substances contained therein, which statement, design or device shall be false or misleading in any particular: Provided, That an article of food which does not contain any added poisonous or deleterious ingredients shall not be deemed to be adulterated or misbranded in the following cases:

" 'First. In the case of mixtures or compounds which may be now or from time to time hereafter, known as articles of

food, under their own distinctive names, and not an imitation of or offered for sale under the distinctive name of another article, if the name be accompanied on the same label or brand with a statement of the place where said article has been manufactured or produced.

“‘Second. In the case of articles labeled, branded, or tagged, so as to plainly indicate that they were compounds, imitations, or blends, and the word “compound,” “imitation,” or “blend,” as the case may be, is plainly stated on the package in which it is offered for sale: Provided, That the term blend as used herein shall be construed to mean a mixture of like substances, not excluding harmless coloring or flavoring ingredients used for the purpose of coloring and flavoring only: And provided further, That nothing in this Act shall be construed as requiring or compelling proprietors or manufacturers of proprietary foods which contain no unwholesome added ingredient to disclose their trade formulas except in so far as the provisions of this Act may require to secure freedom from adulteration or misbranding.’

“‘Before stating or discussing the particular questions as to which you desire my opinion, I think it will conduce to clearness to call attention to the general purpose of this Act and to some considerations founded thereon.

“‘The primary purpose of the pure food law is to protect against fraud consumers of food or drugs; as an incidental or secondary purpose, it seeks to prevent, or, at least, to discourage the use of deleterious substances for either purpose; but its first aim is to insure, so far as possible, that the purchaser of an article of food or of a drug shall obtain nothing different from what he wishes or intends to buy. According to the recognized canons of statutory construction, the language of its provisions must be interpreted with reference to and in harmony with this primary general purpose; so that, in determining the proper nomenclature of articles of food as defined in the Act, the intention of the law will be best observed by giving to such articles names readily understood and conveying definite and familiar ideas to the general public, although such names may be inaccurate in

the view of a chemist or physicist or an expert in some particular industrial art, as in the distillation and refining of spirits. Moreover, the same name may be given by dealers or by the general public to two or more substances varying very materially in their scientific characteristics and this fact must be given due weight in passing upon questions of branding or labeling under the law.

“Human experience has associated certain impressions on the senses of taste and smell with the consumption of certain articles of food, and the so-called ‘flavor’ which expresses the resultant of these impressions constitutes a factor of decisive weight in determining the similarity or identity of substances of this character to the mind of the ordinary member of the community, quite irrespective of the relative importance of these chemical or physical properties in the substances which impart this flavor as compared to their other chemical or physical properties. This fact is aptly illustrated by a question considered at much length in the papers referred and also submitted to me as above, namely: ‘What is Whisky?’ A chemist or a distiller might answer this question altogether differently from the ordinary purchaser of whisky for his own consumption; but this purchaser’s view of the matter is material to attain the primary purpose of the pure food law; and I think it may be safely said that what he means by ‘whisky’ when buying it is a distilled spirit, fit for use as a beverage and having the particular flavor which human experience has classified as that of ‘whisky.’ Undoubtedly the flavors of different kinds of spirits all known as ‘whisky’ differ considerably, and it may be that the general impression of their similarity is due, in some measure, to imagination or imperfect memory; nevertheless, a distinct and definite idea is suggested by the words ‘whisky flavor;’ this idea is an essential factor in ascertaining the identity of a spirit claimed to be whisky, and, in my opinion, it is the decisive factor in determining the relative weight of the claims of two or more kinds of spirits to the name.

“With this preliminary explanation, I proceed to state

what I understand to be the questions as to which my opinion is desired. In substance, these are:

"First. Under what circumstances should a distilled spirit be labeled or branded 'whisky' without any qualifying words?

"Second. Under what circumstances should a liquid be marked a 'blend of whiskies,' or 'blended whisky,' or 'blended whiskies?'

"Third. Under what circumstances should a liquid be marked as a 'compound of whisky,' or 'compounded whisky,' and what word or words, if any, must be added to such title to make the same appropriate under the law?

"Fourth. Under what circumstances, if at all, could a distilled spirit, with additions of coloring and flavoring substances, be termed 'imitation whisky?'

"Before dealing directly with these questions, I think it may be well to indicate the application of this law to a class of liquids affording a field for its interpretation with less opportunity for dispute—I refer to wines. It will not be questioned that to be branded or labeled 'Sherry,' 'Port' or 'Madeira,' a wine must have inherently, and not because any other substance is added to it, the flavor known as that of sherry, port or madeira, as the case may be. There are different kinds of each of these wines; experts can recognize different brands or vintages by their respective flavors, and these flavors vary considerably; nevertheless, there can be no doubt that the sherry, the port and the madeira flavors are distinct from each other, and that each of them has some quality of its own shared by all varieties of the same species of wine.

"There is, however, an evident distinction to be drawn between a wine such as sherry, port or madeira, and a wine such as champagne. In the view of a chemist or physicist, champagne would be doubtless described as 'a compound,' for it consists essentially of a wine, of sugar and of an aerating gas, three substances obviously 'unlike.' The law, however, in my opinion, does not contemplate that an article should be marked as a 'blend,' 'compound,' or 'imitation'

unless its designation would be otherwise 'false or misleading' to the consumer; and the name 'Champagne' would indicate to any would-be purchaser, who was ordinarily intelligent and well-informed, a wine artificially sweetened and aerated, or, in other words, a composite substance.

"To determine the proper use of the term 'blend' we must first note that the definition of the word in the law is novel and arbitrary. It is thus defined by Webster:

"'Blend, n. A thorough mixture of one thing with another, as colors, liquors, etc.; a shading and merging of one color, tint, etc., into another, so that it can not be known where one ends or the other begins.'

"There is nothing in this definition about 'likeness' in the substances mingled: this feature is introduced for some special purpose in the law, and the latter must be interpreted so as to give effect to this purpose. To show this more clearly we may also note the same dictionary's definition of 'compound.' This is:

"'Compound, n. That which is compounded or formed by the union or mixture of elements, ingredients, or parts; a combination of simples.'

"'Compound' and 'blend' are substantially synonymous when applied to mixtures of liquids in ordinary speech, but the pure food law establishes a distinction of its own between them based upon the character of the ingredients entering into the mixture. In discussing therefore what degree of 'likeness' between the mingled substances will justify their designation as a 'blend' it must be always and carefully remembered (1) that 'blend' is meant to be something essentially different from 'compound,' and (2) that the subject under consideration is a name for an article of food to be embodied in a label or brand in harmony with the primary purpose of the law as above explained. Without going into metaphysical distinctions, or needless explanations, it is my opinion that effect will be most surely given to the evident intent of this provision of the law if it be held that 'blend,' as a substantive, or 'blended,' as an adjective, can be properly and legally used in brands or labels under

the Act of 1906 only when a single substantive, either in the singular or in the plural, need follow to appropriately and adequately designate the combination: thus we can speak of a 'blend of teas' or a 'blended tea,' but not of a 'blend of tea and coffee.' To state the same proposition in different language, I think the two articles mixed must be capable of accurate and sufficient description by a single generic term: they must be substances known by the same name, and that name must be sufficiently distinctive to afford reasonable warning to a purchaser.

"If, therefore, the question be what ought to be called 'blend of sherry,' or 'blended sherry,' or 'blended sherries,' I think that such terms could be applied with propriety only to a mixture of two or more sherries, and not to a mixture of sherry with port or with madeira. This is not because 'likeness' does not exist between the three kinds of wine mentioned, nor because great similarity may not be found in their chemical composition: it is quite possible that, in the latter respect, some kinds of sherry would be found to have greater resemblance to some kinds of port than to other kinds of sherry; just as the chemical composition of a diamond might have much greater similarity to that of coal than to that of some other gems; but the term 'blended sherry' could not be appropriate to a mixture of sherry and port; it would mislead an intending purchaser as to the fact that port entered into the combination; the latter might be named with equal propriety 'blended port.' On the other hand, if this mixture should be termed a 'blend of port and sherry,' there is no distinction in generic designation between a mixture of these two distinct wines and a mixture of two sherries or of two ports, and I think the law clearly intended there should be such a distinction. It might be, perhaps, consistent with the law to call such a mixture 'blended wines,' but this title would be insufficiently specific; it might designate a mixture of burgundy and claret as well as one of port and sherry. In my opinion, it is the intent of the Act of 1906 that the term 'blended sherry,' or 'blend of sherry,' or 'blend of sherries' shall designate a mixture of

two or more kinds of sherry; while the titles 'compound of port and sherry' or 'compounded port and sherry' would appropriately designate a mixture of two unlike substances in the view of the law, namely, two distinct and different kinds of wine; 'unlike' just as diamonds and coal are 'unlike' substances.

"It may be that by diluting neutral spirit (ethyl alcohol) with enough distilled water to reduce it to the normal alcoholic strength of sherry wine, and, by adding appropriate flavoring and coloring substances, a mixture can be produced which tastes and smells and looks like sherry, and when consumed produces substantially the same effects: this mixture, supposing it to contain no article deleterious to health, would be appropriately labeled or branded, under the law, 'imitation sherry.' If it were mixed with real sherry, no one would for a moment claim that the two substances thus combined were sufficiently 'like' to warrant the description of the resultant as a 'blend;' it could only be accurately labeled, under the law, as a 'compound of genuine and imitation sherries,' a designation which would not probably promote its sale.

"Applying the same principles to the choice of brands or labels for distilled spirits, and especially for whiskies, we are at once confronted by the question whether whisky corresponds to a wine like sherry or to a wine like champagne; that is to say, whether it is natural or artificial spirit; meaning by the first term, of course, not that it exists anywhere as a product of nature, but that it is the resultant of the process of distillation alone, without needing any further addition to furnish its characteristic qualities. In the first case, it would be assimilated to brandy or rum; in the second contingency, to gin, since gin is essentially a distilled spirit, frequently as nearly neutral as may readily be, flavored by an infusion of juniper berries. I learn from the papers referred to me that the Department of Agriculture has reached the conclusion that whisky, like brandy and rum and unlike gin, is a natural spirit, its peculiar taste and aroma being imparted to it in the course of distillation and

arising primarily from essential oils existing in the substances from which it may be distilled; that is to say, it corresponds to a wine like sherry and not to a wine like champagne. This conclusion seems to be fully warranted by information contained in the papers before me and by such other information as I have been able to obtain; nevertheless, as hereinafter set forth, the statement may, perhaps, need some qualification, or, rather, some explanation. It is doubtful, however, whether the definition of 'whisky' contained in the papers aforesaid, and which I understand to have received the approval of the Department of Agriculture, is quite broad enough to meet the general intent of the law of 1906. This definition I understand to be as follows:

" 'Whisky is a distillate, at the required alcoholic strength, from the fermented mash of malted cereals, or from malt with unmalted cereals, and contains the congeneric substances formed with ethyl alcohol which are volatile at the ordinary temperatures of distillation, and which give the character to the distillate.'

"In Webster's Dictionary 'whisky' is defined as:

" 'An intoxicating liquor distilled from grain, potatoes, etc., especially in Scotland, Ireland and the United States. In the United States, whisky is generally distilled from maize, rye or wheat, but in Scotland and Ireland is often made from malted barley.'

"In Worcester's Dictionary it is defined as:

" 'A kind of spirit distilled from barley, wheat, rye, maize, potatoes, etc.'

"In Chambers' Encyclopedia of 1875, it is defined as follows:

" 'A spirit made by distillation from grain of any sort and from other materials, as buckwheat, potatoes and even turnips.'

"A large number of similar definitions from standard popular works of reference might be given, and I think there can be no doubt that a spirit generally known and described as 'whisky' is often distilled from potatoes and

occasionally from some other substances which could scarcely be correctly classed as cereals. I note this fact because it appears to me contrary to the spirit and subversive of the purpose of the pure food law to adopt a definition which would exclude from the name any substance generally understood by the public to be entitled to it; that is to say, the nomenclature adopted to give effect to the Act ought to be, in my opinion, popular and not scientific. This matter, however, is of only subordinate importance in connection with the questions immediately under discussion.

"It being admitted that whisky is a natural spirit having certain 'congeneric substances,' which, in the language of the above definition 'gives the character to the distillate,' it seems obvious that a mixture of two or more different whiskies as thus defined, whether their differences arise from the character of the substances from which they were distilled or from the method of distillation used in each case respectively, or even from their several ages and the environment in which they were kept subsequently to distillation, would be appropriately termed a 'blend of whiskies,' or 'blended whisky,' or 'blended whiskies;' any one of these three terms would be appropriate, provided that each article entering into the combination, standing alone, would be appropriately designated as 'whisky.'

"The mixture of a spirit properly designated as 'whisky' with another spirit which, standing alone, would not be properly designated as 'whisky,' such as ethyl alcohol, must, in my opinion, be labeled or branded as a 'compound,' or as 'compounded.' This question has given rise to a very animated dispute, and it is understood that great importance is attached by dealers to its determination, which is thought to involve serious pecuniary loss or gain to some or others among them: I have, therefore, considered it very carefully. In Chambers' Encyclopedia, above quoted, Volume III, article 'Distillation,' occurs the following passage:

" 'If only alcohol and water passed over in distillation, all spirits, from whatever extracted, would be the same; but this is not the case. Brandy, which is distilled from

wine, has a peculiar essential oil derived from the grape and also some acid; rum is impregnated with an essential oil from the sugar cane, and with other impurities; malt liquor has the essential oil of barley, etc. It is these essential oils that give to the various spirits their distinguishing flavors. Some of the oils and other impurities are disagreeable and positively noxious, and it is one of the objects of rectifying to remove these. The mellowing effects of age upon spirits is owing to the evaporation, or spontaneous decomposition of the essential oils. Newly distilled spirits are, in general, fiery and specially unwholesome.'

"This statement from a popular work seems to be fully sustained by works of greater scientific authority and shows, in my opinion, that, for the purposes of the pure food law, neutral spirit or ethyl alcohol, if absolutely pure, would be, not only like, but actually identical, whether it were derived from fruit, from cereals, from sugar cane, or from any other of the many substances which can furnish alcohol. Inasmuch as a state of absolute purity can not be attained by any treatment appropriate for commercial purposes, it may be, perhaps, more nearly accurate to say that each of these different kinds of neutral spirit is a like substance to one of any other kind; but, if we concede that ethyl alcohol is a 'like substance' to whisky, then we must also concede that brandy and rum are 'like substances' to whisky also, because each of them, on precisely the same grounds, can be likened to neutral spirit. It is undoubtedly true that only a very small proportion (less than the half of 1 per centum) of the ingredients entering into whisky are different from those entering into neutral spirit; but this is equally true of brandy and rum, and it is precisely those substances which 'give the character to the distillate' in each of these cases.

"In the nature of things there can have been, as yet, no judicial decisions as to the meaning of the terms used in the pure food law, but section 3287 of the United States Revised Statutes, as amended in 1879, 1880 and 1899, has been cited to me to show the 'likeness' of whisky and neutral

spirit as matter of law; I find, however, nothing in that section at all relevant to the present discussion. It requires the cask to indicate 'the particular name of such distilled spirits as known to the trade, that is to say, high wines, alcohol or spirits, as the case may be.' It is undoubtedly true that in distillation under the improved methods of modern times a neutral spirit may be produced at a later stage of the process out of something which at an earlier stage of the process was crude whisky or so-called 'high wines;' but this no more shows neutral spirit to be a 'like substance' to whisky than vinegar is a 'like substance' to cider or to wine, or that beef is a 'like substance' to veal.

"My attention has been likewise called to the case of *Taylor Company v. Taylor*¹ in the Court of Appeals of Kentucky, as establishing the propriety of designating a mixture of whisky and ethyl alcohol as 'a blend' or 'blended.' In this case it was determined that the selling of whisky mixed with neutral spirit under a label which might lead the uninformed to suppose that it was a 'straight whisky' was a fraud upon the public as well as upon the manufacturer of the 'straight' article. In its opinion the court says:

" 'The defendant may properly sell his brand of 'Old Kentucky Taylor,' provided he so frames his advertisements as to show that it is a blended whisky; but he cannot be allowed to impose upon the public a cheaper article and thus deprive appellant of the fruits of his energy and expenditures by selling his blended whisky under labels or advertisements which conceal the true character of the article, for this would destroy the value of the appellant's trade.'

This decision was rendered on March 17, 1905, more than a year before the approval of the pure food law; in speaking of a mixture of whisky and neutral spirit as 'blended whisky,' the court has not, of course, in mind the definition of 'blend' in that law, which, as above noted, is altogether novel and arbitrary; on the other hand, the decision may have been considered by the Congress when it framed the

¹ (Ky.), 85 S. W. 1085, 27 Ky. L. Rep. 625.

pure food law; and the special and original definition of 'blend' given in that law, may have been intended for the very purpose of making more difficult such frauds as the Court of Appeals in Kentucky condemned in this case.

"I conclude, therefore, that according to the true intent of the pure food law, a mixture of whisky with neutral spirit must be deemed a 'compound' and not a 'blend,' although the spirit may be a distillate from the same substance used to furnish the whisky, and that such a mixture stands on the same footing as a mixture of whisky and brandy or of whisky and rum.

"The definition of 'whisky' as a natural spirit involves as its corollary that there can be such a thing as 'imitation whisky.' If the same process were followed of which we spoke in connection with artificial wine, namely, if ethyl alcohol, either pure or mixed with distilled water, were given, by the addition of harmless coloring and flavoring substances, the appearance and flavor of whisky, it is impossible to find any other name for the product, in conformity with the pure food law, than 'imitation whisky.'

"An interesting question remains, the question, in my opinion, of greatest difficulty connected with the subject; namely, whether a mixture of a liquid such as has just been described, or, indeed, a mixture of ethyl alcohol itself with whisky ought to be labeled 'whisky' at all. When the words 'compound' or 'compounded' are used in the Act, it is, in my judgment, ordinarily necessary, that two substances, at least, should be mentioned as entering into the combination described; in other words, it would not be accurate to call a mixture of port and sherry 'compounded sherry' or 'compounded port;' such a mixture must be designated as 'sherry compounded with port' or 'port compounded with sherry' or 'compound of port and sherry.' As above stated, this would be, to say the least, no less true if an imitation sherry were used to mix with a genuine sherry, and, at first sight, it would seem that the same reasoning would deny the name 'whisky' to a compound of 'straight' whisky and ethyl alcohol whether with or without coloring and flavoring sub-

stances. There is, however, a distinction between the two cases, and it is not universally true that two substantives must follow 'compound' or 'compounded,' although it is true, in my opinion, that only one substantive can appropriately follow 'blend' or 'blended.'

"In the first place, we may note that the 'imitation sherry' described above would not be a wine at all, while ethyl alcohol is clearly a spirit; this distinction, however, is not essential. But, so far as I know, no practice exists in the wine trade of mixing port with sherry or genuine with artificial sherry and calling the mixture by the name of either one of its ingredients. On the other hand, there is, and has been for a long time in existence a well-known practice of mixing ethyl alcohol with whisky to give the latter an artificial age and thus produce the so-called "mellowness" of old whisky, which is caused by the gradual and partial evaporation of the essential oils contained in new whisky; and it seems to be a long and well-established custom in the trade to call the mixture of whisky and alcohol thus produced 'blended whisky.' For the reasons above set forth, I think the law has forbidden the use of the adjective, but it is otherwise with the noun.

"In the Encyclopedia Britannica of 1878, Vol. VII, under the head 'Distillation,' there is the following statement:

"'Flat bottomed and fire heated stills are considered the best for the distillation of malt spirit, as by them the flavor is preserved. Coffey's still, on the other hand, is the best for the distillation of grain spirit, as by it a spirit is obtained almost entirely destitute of flavor and of a strength varying from 55 to 70 over proof. Spirit produced of this high strength evaporates at such a low temperature that scarcely any of the volatile oils on which the peculiar flavor of spirits depends are evaporated with it, hence the reason why it is not adapted for the distillation of malt whisky which requires a certain amount of these oils to give it its requisite flavor. The spirit produced by Coffey's still is, therefore, chiefly used for making gin and factitious brandy by the rectifiers, or for being mixed with malt whiskies by the wholesale dealers.'

"The practice therein described has become during the past twenty-eight years much more general than it was, in the United States as well as in Great Britain, and improvements in the art of distillation have rendered it much easier and more profitable.

"As above explained, I consider 'Champagne' a suitable label or brand for the composite wine known by that name. If a natural wine existed which was sweet and sparkling and also generally known as 'Champagne,' a mixture of the two might be, I think, appropriately called 'compound' or 'compounded champagne,' and, in accordance with this analogy, I conclude that a combination of whisky with ethyl alcohol, supposing, of course, that there is enough whisky in it to make it a real compound and not the mere semblance of one, may be fairly called 'whisky;' provided the name is accompanied by the word 'compound' or 'compounded,' and provided a statement of the presence of another spirit is included in substance in the title. I am strengthened in this conclusion by understanding from the papers you have referred to me that it has been reached by the Department of Agriculture as well.

"The following seem to me appropriate specimen brands or labels for (1) 'straight' whisky, (2) a mixture of two or more 'straight' whiskies, (3) a mixture of 'straight' whisky and ethyl alcohol, and (4) ethyl alcohol flavored and colored so as to taste, smell, and look like whisky:

"(1) *Semper Idem Whisky*: A pure straight whisky mellowed by age.

"(2) *E Pluribus Unum Whisky*: A blend of pure, straight whiskies with all the merits of each.

"(3) *Modern Improved Whisky*: A compound of pure grain distillates, mellow and free from harmful impurities.

"(4) *Something Better than Whisky*: An imitation under the pure food law, free from fusel oil and other impurities.

"In the third specimen it is assumed that both the whisky and the alcohol are distilled from grain.

"I remain, sir, yours very respectfully and truly,

"Charles J. Bonaparte,
Attorney-General."

Upon receipt of this letter President Roosevelt wrote the following letter to the Secretary of Agriculture:

“The White House,
“Washington, April 10, 1907.

“My Dear Mr. Secretary:

“In accordance with your suggestion, I have submitted the matter concerning the proper labeling of whisky under the pure food law to the Department of Justice. I inclose the Attorney-General's opinion. I agree with this opinion and direct that action be taken in accordance with it.

“Straight whisky will be labeled as such.

“A mixture of two or more straight whiskies will be labeled ‘blended whisky’ or ‘whiskies.’

“A mixture of straight whisky and ethyl alcohol, provided that there is a sufficient amount of straight whisky to make it genuinely a ‘mixture,’ will be labeled as compound of, or compounded with, pure grain distillate.

“Imitation whisky will be labeled as such.

“Sincerely yours,

“Theodore Roosevelt.

“Hon. James Wilson.

“Secretary of Agriculture.”

§ 385. Whisky, Decision of President Taft on Labeling Whiskies.

On December 27, 1909, after a careful examination of a vast mass of evidence, and after the decision noted in the preceding section, President Taft rendered the following opinion on the labeling or branding of various kinds of whisky:

“By the Pure Food Act of June 30, 1906, Congress forbade the introduction into interstate and foreign commerce of adulterated or misbranded drugs or articles of food, with two objects, one to preserve the health of the people, and the other to prevent their being deceived by label or brand as to the real character of drugs or articles of food offered for sale. Within the definitions of the Act potable liquors are

articles of food. An important controversy has arisen in the execution and application of the Act as to whether the branding of certain potable liquors with the name 'whisky' is a misbranding within the Act. All distilled spirits pay, under the internal revenue laws, a heavy tax. The tax is measured by a certain rate per proof gallon. Theoretically pure ethyl alcohol is 200° proof. A proof gallon of distilled spirits is half water and half alcohol, or a gallon of 100° proof. Potable strength varies from 90° to 102° or 103°. Distilled spirits are manufactured under the close supervision of revenue officers and the brands which are placed upon the packages containing the spirits after manufacture are placed there under regulations of the Internal Revenue Bureau. It is, of course, of the highest importance that the internal revenue law and the pure food law should be enforced in such a way as to accomplish the purposes of both.

"In Internal Revenue Order No. 723 (April, 1907) directions were given as to how certain distilled spirits should be branded. The effect of this order was to deny the right to the use of the brand 'whisky' to any distilled liquor except that which is known to the trade as 'straight whisky' and to require the branding of several kinds of liquors distilled from grain as 'imitation whisky.' The pure food act does not mention the term 'whisky;' it does not authorize any officers to fix a standard in respect to any article of food or liquor. It therefore leaves the question of what liquor may be properly branded as whisky to those who have to execute the pure food law and the internal revenue law, subject, of course, to a review of a correctness of their action by courts whenever a case between parties litigant, properly within the jurisdiction of such courts shall arise. Attorney-General Bonaparte was asked to pass upon the question of what properly might be included under the brand of whisky within the pure food law, and rendered two decisions in which he in effect limited the proper use of the brand to what is known in the trade as 'straight' whisky. So far as it appears from Mr. Bonaparte's opinions, he ac-

cepted a definition of whisky from a dictionary or encyclopedia, and, in forming and expressing his opinion, he had not the benefit of any evidence as to the meaning or scope of the term acquired from manufacturers, dealers or consumers in the trade. Internal Revenue Order 723 was founded on Mr. Bonaparte's opinions.

A petition was filed in April last by a large number of distillers whose interests were affected, asking that the issue passed upon by Mr. Bonaparte and confirmed by Mr. Roosevelt in Internal Revenue Order No. 723 be reheard on the ground that the meaning of the term 'whisky' is one of fact, and is to be properly determined only after consideration of competent evidence drawn from those familiar with the trade in which liquors are manufactured and sold. The rehearing was granted, and the matter was referred to Hon. Lloyd Bowers, Solicitor-General, to determine upon evidence to be submitted by all parties in interest:

"1. What was the article called 'whisky' as known (1) to the manufacturers; (2) to the trade, and (3) to the consumers at and prior to the date of the passage of the pure food law?

"2. What did the term 'whisky' include?

"3. Was there included in the term 'whisky' any maximum or minimum of congeneric substances as necessary in order that distilled spirits should be properly designated whisky?

"4. Was there any abuse in the application of the term 'whisky' to articles not properly falling within the definition of that term at and prior to the passage of the pure food law, which it was the intention of Congress to correct by the provisions of that Act?

"5. Is the term 'whisky' as a drug applicable to a different product than whisky as a beverage? If so, in what particulars?

"A very full hearing was had before the Solicitor-General and a large amount of evidence was taken, making a record of more than 1,200 printed pages. The answers of the Solicitor-General to the questions were detailed and ex-

act. I shall not set them out. It is sufficient to say that he found from the evidence that whisky, as a term of the trade for many years, included much more than 'straight' whisky; that it included 'rectified' whisky, 'redistilled' whisky, and all distillates of grain reduced by water to potable strength and containing a sufficient trace of fusel oil or the congeneric substances accompanying grain distillation to give a distinctive whisky flavor to the liquor; and this whether or not colored by burnt sugar or other harmless flavoring and coloring matter. But he excluded from the proper meaning and scope of the term 'whisky' that product of continuous distillation called 'neutral spirits,' though reduced to potable strength and colored and flavored by burnt sugar, on the ground that in such product there was not enough of the fusel oil or congeneric substances to give to the liquor the distinctive flavor of whisky. He found further that the mixture of neutral spirits with whisky, if a sufficient quantity of fusel oil or congeneric substances remained to retain the whisky flavor, was not an adulteration and did not make it other than whisky.

"Exceptions were taken by all parties to these findings of the Solicitor-General, and the whole record of the evidence has been brought before me for consideration and decision. I invited the Attorney-General and the Secretary of Agriculture to sit with me and hear the arguments. Because of the importance of the case, I have thought it necessary to read with care the entire evidence adduced. The Solicitor-General has rendered an opinion to justify his findings of great ability and acumen; and I reach a somewhat different conclusion from him with much reluctance. But I am led to do so by a very clear conviction as to what the evidence shows.

"Whisky for more than one hundred years has been the most general and comprehensive term applied to liquor distilled from grain. It is derived from the Irish word "Usquebaugh," and for more than a century has been used in Ireland, Scotland, England, and in this country to mean ardent spirits distilled from grain reduced to potable strength. Its flavor and color have varied with the changes in the process

of its manufacture in the United States, Ireland, Scotland, and England, and have been varied by the introduction into it of fruit juice and burnt sugar and other substances. It was manufactured originally in what was called a 'pot still' by the distillation of wort and beer fermented from grain. It was composed of about equal parts of water and ethyl alcohol and certain substances now called congeneric substances which united were known as fusel oil; and when the distillate was first produced the so-called fusel oil gave to the liquor a very disagreeable odor and a very raw taste. The efforts of those engaged in the manufacture were directed toward the reduction of the amount of fusel oil in the product and toward the elimination of the disagreeable odor and taste produced by it. This was effected for a great many years by passing the distilled spirit through leaching tubs of charcoal, which tended to purify and reduce the amount of fusel oil and subsequently rectification was followed by another step—i. e., redistillation—and at all times by the introduction of fruit essences or burnt sugar. Burnt sugar is used in Scotch whisky as well as in American whisky, though not to the same extent or in the same proportion. Between 1850 and 1860 in this country a very large and profitable business began in certain well-known brands of whisky, which were purified by leaching tubs and were colored and flavored by the use of caramel or burnt sugar. Though there was some American white whisky, the conventional amber or brown color and whisky flavor in America was that produced by a mixture of the raw whisky with its fusel oil reduced as much as possible, and of burnt sugar or caramel.

"Some time during the Civil War it was discovered that if raw whisky as it came from the still, unrectified and without redistillation, and thus containing from one-half to one-sixth of one percent of fusel oil, was kept in oak barrels, the inside of the staves of which were charred, the tannic acid of the charred oak which found its way from the wood into the distilled spirits would color the raw white whisky to the conventional color of American whisky, and after

some years would eliminate altogether the raw taste and the bad odor given the liquor by the fusel oil and would leave a smooth, delicate aroma, making the whisky exceedingly palatable without the use of any additional flavoring or coloring. The whisky thus made by one distillation and by aging in charred oak barrels came to be known as 'straight' whisky, and to those who were good judges came to be regarded as the best and purest whisky.

"Meantime the other and shorter method of making whisky grew greatly in its use, and the amount of distilled spirits made from grain ether by rectifying or by redistilling, which were reduced to potable strength and given a conventional flavor of whisky by the use of burnt sugar and other essences, far exceeded that of the so-called 'straight whiskies;' and as according to this method a potable, pleasing beverage could be made in a short time without the ageing in wood and without the loss of interest on the capital involved in holding the product for two or three years while it acquired color and flavor, it could be sold, of course, much cheaper. It was made originally by distilling a product at a proof of from 140° to 160°, called 'high wines,' by taking these high wines to a rectifying house and there passing them through leaching tubs to reduce as far as possible the fusel oil, and then coloring and flavoring the whisky with burnt sugar; or by another step of purification, which was a redistillation of the high wines, reducing the fusel oil still further, and then the coloring and flavoring by caramel. The product of this system was known as 'finished whisky;' whereas the raw spirits delivered were known as 'high wines.'

"Subsequently, about 1872 or a little later, a patent still came into use by which it was possible through one process of continuous distillation to clarify the spirits somewhat more completely of the fusel oil than the old system of rectifying by leaching tubs, or even by redistillation as a separate step; and the result of this continuous distillation was the production of what was known, and is known now, as 'neutral spirits,' at a proof varying from 160° to 188°. They

still had a small trace of the congeneric substances that go to make up what is known as 'fusel oil,' but not enough substantially to affect the flavor. The rectifiers, who pay a tax as such under the internal revenue law, then began to use neutral spirits as they had used high wines before, to color them with burnt sugar, and to offer them as whisky. The difference between the whisky made from high wines and the whisky made from neutral spirits was the difference in the traces of fusel oil, being less in the latter than in the former, but, so far as I am able to determine from the evidence, there was only a difference in slight degree. The importance of the fusel oil in the product ready for the drinker can be judged by the fact that it varies in straight whisky from one-half of one percent to one-sixth of one percent, but that in rectified and redistilled whisky it is considerably less, and in the presence of burnt sugar it can hardly be perceptible to the taste.

"All these products—straight whisky, rectified spirits whisky, redistilled spirits whisky, and neutral spirits whisky—when reduced by water to a hundred proof or less and sold upon the market as beverages were known to the trade and to customers as 'whiskies;' the difference between straight whisky and the neutral spirits whisky, which now constitutes and for thirty years last passed has constituted, perhaps 75 percent of all the whisky sold, was well understood, and the difference between the two was seen in the difference in price which each commanded in the market.

"It was supposed for a long time that by the aging of straight whisky in the charred wood a chemical change took place which rid the liquor of fusel oil and thus destroyed the unpleasant taste and odor. It now appears by chemical analysis that this is untrue; that the effect of the ageing is only to dissipate the odor, and to modify the raw, unpleasant flavor, but to leave the fusel oil still in the straight whisky. Fusel oil is known to be poisonous and injurious. In the small quantity in the straight whisky it probably does no harm. But however this may be, it is certain that in the whisky made of neutral spirits there is less fusel oil and less

of the poison arising therefrom than there is in the straight whisky. The question, therefore, is not here one of health. It is only one of correct branding to prevent deceit of the public as to what it is buying.

"After an examination of all the evidence it seems to me overwhelmingly established that for a hundred years the term 'whisky' in the trade and among the customers has included all potable liquor distilled from grain; that the straight whisky is, as compared with the whisky made by rectification or redistillation and flavoring and coloring matter, a subsequent improvement, and that therefore it is a perversion of the pure food Act to attempt now to limit the meaning of the term 'whisky' to that which modern manufacture and taste have made the most desirable variety.

"Exactly the same question has arisen in England and has been determined by a royal commission of eminent lawyers and scientific men in the same way. That commission held, after a full investigation, that neutral, or velvet spirits as they are there more frequently called, made by a patent still from grain whisky when reduced to potable strength. The same conclusion is shown to have been in the mind of Congress in 1882 when a question arose in the House of Representatives, as between the method of taxation of straight whisky and of that liquor which was the product of continuous distillation. Both were denominated whisky in the discussion. Congress legislated with reference to the distinction between the two in the method of manufacture and preparation for use as a beverage, which was admitted on all sides to exist, but no question was made as to the proper application of the term 'whisky' to both kinds of liquor.

"With deference to the very able consideration of this question made by Dr. Wiley and other distinguished chemists, I think the fundamental error in all conclusions differing from this is one of fact as to what the name of whisky actually has included for the last hundred years; and while Mr. Bowers, the Solicitor-General, greatly enlarged in his definition the character and scope of the term 'whisky' be-

yond theirs, he fell into what seems to me to be the error of making too nice a distinction in reference to the amount of congeneric substances or traces of fusel oil required to constitute whisky for practical purposes when the flavor and color of all whiskies but straight whiskies have been chiefly that of ethyl alcohol and burnt sugar. If high wines at from 140° to 160° when reduced to potable strength and containing a very small quantity of fusel oil and flavored by burnt sugar are whisky, as he has found, then the mere improvement in the process by continuous distillation so as to give a product of from 160° to 188° proof and still further to reduce its fusel oil, is to not change its whole nature or to make what was genuine 'whisky' 'imitation whisky,' because of a slightly reduced trace of one ingredient. The distinction is too impracticable, in my judgment, for the execution of the law. It may be that the public were not fully or exactly advised as to the change in the process when it was made, but the change in the process was slight and effected economy in the production rather than the flavor of the product; and if the public detected no difference in flavor in the product of the improved process, as they did not, but continued for forty years to regard it as the same, there was no deceit in continuing to call whisky that which was thus merely improved in its manufacture without substantial change of composition or flavor.

"It is undoubtedly true that the liquor trade has been disgracefully full of frauds upon the public by false labels; but these frauds did not consist in palming off something which was not whisky as whisky, but in palming one kind of whisky as another and better kind of whisky. Whisky made of rectified or redistilled or neutral spirits and given a color and flavor by burnt sugar, made in a few days, was often branded as Bourbon or Rye straight whisky. The way to remedy this evil is not to attempt to change the meaning and scope of the term 'whisky,' accorded to it for one hundred years, and narrow it to include only straight whisky; and there is nothing in the pure food law that warrants the inference of such an intention by Congress. The way to do

it is to require a branding in connection with the use of the term 'whisky' which will indicate just what kind of whisky the package contains. Thus, straight whiskies may be branded as such and may be accompanied by the legend 'aged in wood.' Whisky made from rectified, redistilled, or neutral spirits may be branded as whisky made from rectified, redistilled, or neutral spirits, as the case may be.

"With this result, the question arises what ought the order to be so that the purposes of the pure food law can be carried out. The term 'straight whisky' is well understood in the trade and well understood by consumers. There is no reason therefore, why those who make straight whisky may not have the brand upon their barrels of straight whisky, with further descriptive terms as 'Bourbon' or 'Rye' whisky, as the composition of the grain used may justify, and they may properly add, if they choose, that it is aged in wood.

"Those who make whisky of 'rectified,' 'redistilled,' or 'neutral' spirits can not complain if, in order to prevent further frauds, they are required to use a brand which shall show exactly the kind of whisky they are selling. For that reason it seems to me fair to require them to brand their product as 'whisky made from rectified spirits,' or 'whisky made from redistilled spirits,' or 'whisky made from neutral spirits,' as the case may be; and if aged in the wood, as sometimes is the case with this class of whiskies, they may add this fact.

"A great deal of the liquor sold is a mixture of straight whisky with whisky made from neutral spirits. Now, the question is whether this ought to be regarded as a compound or a blend. The pure food law provides that 'in the case of articles labeled, branded, or tagged so as to plainly indicate that they are compounds, imitations, or blends,' the term 'blend' shall be construed to mean a mixture of like substances, not excluding harmless coloring or flavoring ingredients used for the purpose of coloring and flavoring only. It seems to me that straight whisky and whisky made from neutral spirits, each with more than ninety-nine and a half percent ethyl alcohol and water, and with less than half of

one percent of fusel oil, are clearly a mixture of like substances, and that while the latter may have and often does have burnt sugar or caramel to flavor and color it, such coloring and flavoring ingredients may be regarded as for flavoring and coloring only, because the use of burnt sugar to color and flavor spirits as whisky is much older than the coloring and flavoring by the tannin of the charred bark. Therefore, where straight whisky and whisky made from neutral spirits are mixed, it is proper to call them a blend of straight whisky and whisky made from neutral spirits. This is also in accord with the decision of the British Royal Commission in the case which I have cited upon a similar issue.

"Canadian Club whisky is a blend of whisky made from neutral spirits and of straight whisky aged in the wood, and its owners and vendors are entitled to brand it as such.

"Neutral spirits made from molasses and reduced to potable strength has sometimes been called whisky, but not for a sufficient length of time or under circumstances justifying the conclusion that it is a proper trade name. The distillate from molasses used for drinking has commonly been known as rum. The use of whisky for it is a misbranding.

"There are other kinds of liquor in respect to which a decision is invoked, but it is thought that the principles above stated, and the directions above given in specific cases, will furnish a clear precedent for all other cases.

"By such an order as this decision indicates the public will be made to know exactly the kind of whisky they buy and drink. If they desire straight whisky, then they can secure it by purchasing what is branded 'straight whisky.' If they are willing to drink whisky made of neutral spirits, then they can buy it under a brand showing it; and if they are content with a blend of flavors made by the mixture of straight whisky and whisky made of neutral spirits, the brand of the blend upon the package will enable them to buy and drink that which they desire. This was the intent of the Act. It injures no man's lawful business, because it only insists upon the statement of the truth in the label.

If those who manufacture whisky made of neutral spirits, and wish to call it 'whisky' without explanatory phrase, complain because the addition of 'neutral spirits' in the label takes away some of their trade, they are without a just ground because they lose their trade merely from a statement of the fact. The straight whisky men are relieved from all future attempt to pass off neutral spirits whisky as straight whisky. More than this, if straight whisky or any other kind of whisky is aged in the wood, the fact may be branded on the package, and this claim to public flavor may truthfully be put forth. Thus the purpose of the pure food law is fully accomplished in respect of misbranding and truthful branding.

"This opinion will be certified to the Secretary of the Treasury, the Secretary of Agriculture, and the Secretary of Commerce and Labor to prepare the regulation in accordance herewith, under the pure food law; and to the Secretary of the Treasury and the Commissioner of Internal Revenue to prepare the proper regulation under the internal revenue law.

"William H. Taft.

"The White House, December 27, 1909."

§ 386. Whisky, Labeling Canadian Club.

On October 19, 1910, the Attorney-General gave the Secretary of Agriculture the following opinion on labeling Canadian Club whisky, and incidentally on other liquids:

"Sir: I have received your letter of July 28, 1910, in which you submit to me the following question of law for my opinion:

"'Is "Canadian Club Whisky" such a distinctive name, under the provisions of section 8, paragraphs 10 and 11, of the Food and Drugs Act of June 30, 1906 (34 Stat. 768), as to relieve a mixture of two separate and distinct distillates of grain from the requirement of being labeled "A Blend of Whiskies" under section 8, paragraph 12, of the same Act?"

"Your letter informs me that:

“‘Canadian Club Whisky’ is a mixture of grain distillates, duly aged after mixing, without further admixture, and reaches the consumer at 90 degrees proof. It is a particular kind and brand of whiskies made by Hiram Walker & Sons, Ltd., at Walkerville, Ontario, and is now and has been for years, known and sold under the name ‘Canadian Club Whisky.’ It is known by that name and no other to the trade and consumers in the United States and other countries, and no other whisky is known by that name. The Department of Agriculture,’ you advise me, ‘claims that the product is required to be labeled ‘A Blend of Whiskies,’ under the law as interpreted in Food Inspection Decision 113. The distillers contend that ‘Canadian Club Whisky,’ under section 8 of the Food and Drugs Act, is such a distinctive name as is there described, and, therefore, that the product is not required to be labeled as a blend.’

“By arrangement between your department and Messrs. Hiram Walker & Sons (Limited), briefs were submitted to me by the solicitor of your department and the counsel for Messrs. Hiram Walker & Sons, respectively, in support of their respective contentions; and I have also had the assistance of oral argument by such solicitor and counsel.

“By executive order dated April 8, 1909, the President referred to the Solicitor-General of the United States certain questions, including, among others:

“‘I. What was the article called whisky as known (1) to the manufacturers; (2) to the trade, and (3) to the consumers at and prior to the date of the passage of the pure food law?

“‘II. What did the term whisky include?’

“The Solicitor-General took a voluminous amount of testimony and heard the arguments of parties appearing before him, and reported to the President, on May 24, 1909, among other things, that:

“‘(1) The article called whisky as known to the manufacturers at and prior to the date of the passage of the pure food law was—

“(a) What is often spoken of as “straight whisky,” made from grain.

“(b) Also, what is often spoken of as “rectified whisky,” made from grain, when not a mere neutral spirit, as described in section (d) below, of the answers to this question I.

“(c) Also, a mixture of straight whiskies, or of rectified whiskies, or of straight whisky and rectified whisky or of straight whisky and what is often known as neutral spirit (made from grain), or of rectified whisky and such neutral spirit (made from grain), or of straight whisky, rectified whisky, and such neutral spirit (made from grain), if in the particular case the mixture satisfied the description of whisky given below in answer to question II’ (Proceedings, etc., p. 1245). . . .

“The article called whisky as known to the consumers . . . was—

“(a) What is often spoken of as “straight whisky,” made from grain.

“(b) Also, what is often spoken of as “rectified whisky” if conforming to the description of whisky given below in answer to question II.

“(c) Also, a mixture of straight whiskies, or of rectified whiskies, or of straight whisky and rectified whisky, or of straight whisky and what is often known as neutral spirit (made from grain), or of rectified whisky and such neutral spirit (made from grain), or of straight whisky, rectified whisky, and such neutral spirit (made from grain), if in the particular case the mixture satisfied the description of whisky given below in answer to question II.’

“In answer to the question ‘What did the term whisky include?’ he reported as follows:

“The term “whisky” included, both at and prior to the date of the passage of the pure food law, and has since included, the spirituous liquor composed of (1) alcohol derived by distillation from grain; (2) a substantial amount of by-products (often spoken of as congeners) likewise derived by distillation from grain and giving a distinctive flavor and

properties; (3) water sufficient, without unreasonable dilution, to make the article potable; and (4) in some cases—though such addition is not essential—harmless coloring or flavoring matter, or both, in amount not materially affecting other qualities of whisky than its color or flavor.

“ ‘A mixture of two or more articles, being each a whisky within the foregoing description, was at and prior to the date of passage of the pure food law, and has since been, whisky. A mixture of one or more whiskies, being each whisky within the foregoing description, with alcohol or a neutral spirit—being an article different from whisky through lack of a substantial amount of by-products derived by distillation from grain and giving distinctive flavor and properties—is whisky, if the alcohol or neutral spirit is derived by distillation from grain, and if the mixture still conforms to the above general description of whisky; and so it was at and prior to the date of passage of the pure food law.’ (Proceedings, etc., p. 1246.)

“Upon exceptions to this report, the decision of the Solicitor-General was reviewed by the President, who differed with him only in that he thought the Solicitor-General had fallen into the error of—

‘making too nice a distinction in reference to the amount of congeneric substances or traces of fusel oil required to constitute whisky for practical purposes when the flavor and color of all whiskies but straight whiskies have been chiefly that of ethyl alcohol and burnt sugar.’

“And the President held:

“ ‘After an examination of all the evidence it seems to me overwhelmingly established that for a hundred years the term “whisky” in the trade and among the customers has included all potable liquors distilled from grain; that the straight whisky is, as compared with the whisky made by rectification or redistillation and flavoring and coloring matter, a subsequent improvement, and that therefore it is a perversion of the Pure Food Act to attempt now to limit the meaning of the term “whisky” to that which modern manufacture and taste have made the most desirable variety.’

"‘It is undoubtedly true,’ the President said, ‘that the liquor trade has been disgracefully full of frauds upon the public by false labels; but these frauds did not consist in palming off something which was not whisky as whisky, but in palming one kind of whisky as another and better kind of whisky. Whisky made of rectified and redistilled or neutral spirits and given a color and flavor by burnt sugar, made in a few days, was often branded as bourbon or rye straight whisky. The way to remedy this evil is not to attempt to change the meaning and scope of the term “whisky,” accorded to it for one hundred years, and narrow it to include only straight whisky; and there is nothing in the pure food law that warrants the inference of such an intention by Congress.’

“Following the decision of the President the Secretaries of the Treasury, Agriculture, and Commerce and Labor prepared and promulgated a regulation, under the Food and Drugs Act, known as ‘Food Inspection Decision No. 113,’ the portions of which material to this opinion are as follows:

“‘Under the Food and Drugs Act of June 30, 1906, all unmixed distilled spirits from grain, colored and flavored with harmless color and flavor in the customary ways, either by the charred barrel process, or by the addition of caramel and harmless flavor, if of potable strength and not less than 80° proof, are entitled to the name of whisky without qualification. . . .

“‘Whiskies of the same or different kinds, i. e., straight whisky, rectified whisky, redistilled whisky, and neutral spirits whisky, are like substances, and mixtures of such whiskies, with or without harmless color or flavor, used for purposes of coloring and flavoring only, are blends under the law and must be so labeled.’

“This ruling would require ‘Canadian Club Whisky’ to be sold under a label stating it to be ‘A Blend of Whiskies’ unless, as claimed by the manufacturers, ‘Canadian Club Whisky’ is its own distinctive name within the meaning of section 8 of the pure food law.

“That section prohibits the misbranding of all articles of

food (which include drink), and specifies that the term 'misbranded' shall apply to all articles the package or label of which shall bear any statement, design, or device regarding the article or ingredients contained therein which shall be false or misleading in any particular; that the article shall also be deemed misbranded:

" 'If it be labeled or branded so as to deceive or mislead the purchaser. . . .

" 'If the package containing it or its label shall bear any statement, design, or device regarding the ingredients or the substances contained therein, which statement, design, or device shall be false or misleading in any particular: Provided, That an article of food which does not contain any added poisonous or deleterious ingredients shall not be deemed to be adulterated or misbranded in the following cases:

" 'First. In the case of mixtures or compounds which may be now or from time to time hereafter known as articles of food under their own distinctive names, and not an imitation of or offered for sale under the distinctive name of another article. . . .

" 'Second. In the case of articles labeled, branded, or tagged so as to plainly indicate that they are compounds, imitations, or blends, and the word "compound," "imitation," or "blend," as the case may be, is plainly stated on the package in which it is offered for sale. . . .'

"It is conceded that the requirements in paragraphs first and second, above cited, are alternative, and that a mixture or compound which may be sold under its own distinctive name, pursuant to the provisions of the first paragraph, need not be marked as a 'compound,' 'imitation,' or 'blend,' under the provisions of the second paragraph. Canadian Club Whisky is, as you say, entirely a 'mixture of grain distillates, duly aged after mixing, without further admixture . . .'. It is, therefore, a mixture of two whiskies, as under the President's decision the term 'whisky' in the trade and among customers includes all potable liquor distilled from

grain. Being a mixture of whiskies, it is distinguished from all other whiskies by the name 'Canadian Club.'

"Regulation 20 of the 'Rules and Regulations for the Enforcement of the Food and Drugs Act,' promulgated by the three Secretaries under date of October 17, 1906, and published as Circular No. 21 of the office of the Secretary of Agriculture, reads as follows:

" '(a) A "distinctive name" is a trade, arbitrary, or fancy name which clearly distinguishes a food product, mixture or compound from any other food product, mixture or compound.

" '(b) A distinctive name shall not be one representing any single constituent of a mixture or compound.

" '(c) A distinctive name shall not misrepresent any property or quality of a mixture or compound.

" '(d) A distinctive name shall give no false indications of origin, character, or place of manufacture, nor lead the purchaser to suppose that it is any other food or drug product.'

"Applying this definition, it will be seen (1) that 'Canadian Club Whisky' is a trade or arbitrary name which clearly distinguishes the particular mixture of whiskies so designated from any other whisky or mixture of whiskies.

"(2) This distinctive name 'Canadian Club Whisky' is not one representing any single constituent of the mixture, because the word whisky applies to both of the component elements of the mixture, and to each of them.

"(3) The name 'Canadian Club Whisky' does not misrepresent any property or quality of the mixture, because within the President's definition each of the elements of the mixture is whisky, and the resultant mixture is whisky.

"(4) The name 'Canadian Club Whisky' gives no false indication of the origin, character, or place of manufacture, because the mixture in fact is made in Canada; nor does it lead the purchaser to suppose that it is any other food or drug product, as it clearly asserts that it is whisky—which is the fact—and in your letter it is stated that it is known by that name and no other to the trade and con-

sumers in the United States and other countries, and no other whisky is known by that name. 'Canadian Club Whisky' is therefore the distinctive name of a whisky so called; that name distinguishes the product to which it is attached from all other whiskies, and clearly identifies it as the particular kind and brand of whiskies made by Hiram Walker & Sons (Limited), at Walkerville, Ontario. The name distinguishes the particular goods in relation to which it is used from other goods of a like character belonging to other people (Hopkins on Unfair Trade, section 2). It is certainly as distinctive as the designation 'S. N. Pike's Magnolia Whisky' which, in *Kidd v. Johnson*,¹ was held to constitute a trademark, because distinguishing the whisky of the manufacture of S. N. Pike & Co., and their successors in Cincinnati, from all other whisky.

"The brief of the solicitor of the Department of Agriculture contends that the distinctive name under which a mixture or compound may be sold must in its entirety be purely arbitrary or fanciful, and must not contain the name of the component elements of the compound. A mixture of wheat and barley, he concedes, might be sold as 'Force' or 'Vita,' without stating of what elements it was composed, but a mixture of two kinds of barley could not be sold as 'Melrose barley' without stating that it was 'a blend of barleys.' It seems to me that such a construction of the term 'distinctive name' is not only unwarranted, but undesirable. The two main purposes which the pure food law was designated to accomplish are, first, to prevent the sale of adulterated foods, and, second, to prevent deception being practiced on the public. It would seem to me that the latter purpose is more apt to be secured by permitting the seal of a product under its own name qualified by some distinguishing characterization, than by requiring it to be masked in an anonymity which would give no clue to any of its component elements.

"But without entering into an analysis of the many decisions cited in the briefs of the respective parties, or further pursuing a discussion of the question, it appears to me clear

that the name 'Canadian Club Whisky' is a distinctive name, so arbitrary and so fanciful, as to clearly distinguish it from all other kinds of whisky or other things, and a name which, by common use, has come to mean a substance clearly distinguishable by the public from everything else (see *United States v. 300 Cases of Mapleine*, per Sanborn, D. J.; Notice of Judgment 163, Food and Drugs Act, p. 3). In my opinion, therefore, it is not necessary that the label under which 'Canadian Club Whisky' is sold shall state that it is a 'blend of whiskies.'

"Respectfully,

"George W. Wickersham.

"The Secretary of Agriculture."

§ 387. Whisky—Bourbon Whisky.

A distillery in New Orleans, La., produced no spirit made from grain mash, but only a product from molasses and water. It marked each barrel "Bourbon Whisky." The government seized 50 barrels of whisky so labeled, and it was condemned. The following are the instructions of the court to the jury trying the case:

"I will not call upon counsel for the United States to reply. The case as it is presented to the jury is a very clear one. I reject the only prayer offered by the defense. Really, that prayer concedes the misbranding of the liquor, and asks me to say to the jury that if they shall find that this was done under the control and by the agents of the United States, the United States, which is the plaintiff in this case, is estopped from proceeding to condemn these goods and forfeit the goods for misbranding. That proposition I reject. Every one who deals with agents of the United States deals with them with the knowledge imputed to him of the restriction upon their authority. It seems to me it can not be successfully contended that any agent of the United States has authority to do a thing which is forbidden by law; and it is forbidden by this law passed in 1906, the Pure Food Law, to misbrand any goods which are intended to be or are actually transported from one State to another. Of course the gentlemen of the jury would know, or should know, that the United States has no authority, under the Constitution of the United States, to regulate the sale of goods within the limits of a State. It is only when they are transported from

¹ 100 U. S., p. 617.

one State to another, and become a part of interstate commerce of the country, that the United States has the authority to pass laws regulating them. So this liquor, without infraction of any law so far as I know, might have been offered for sale and sold in Louisiana, unless there is some law of Louisiana which prohibits the misbranding of or misrepresentation with regard to the constituents of an article that is offered for sale. It is only, therefore, when these goods become a part of the interstate commerce of the country that this Pure Food Law of 1906 applies to them, that 'misbranding' shall apply to the placing on the package of any statement which shall be false and misleading in any particular, and provides that any article misbranded, which is transported from one State to another for sale, is liable to confiscation. Therefore I do not think that anything that was done in the distillery in Louisiana, in New Orleans, in any way estops the United States or estops the authorities, or the agents of the United States in Maryland, from proceeding to condemn these goods upon the ground that they were misbranded. It would be destructive of the enforcement of many of the laws of the United States if the act of any agent of the United States could be set up as a defense against the explicit law; the explicit law in this case being that any goods that are misbranded shall be forfeited. If any gauger, at the request of a distiller or under a generally understood practice of the distillery, should misbrand an article of liquor, it would be utterly subversive of the law if that could be said to be a defense to the positive enactment of the Act of 1906 that misbranding goods that are to be transported from one State to another shall be prohibited. I, therefore, reject that contention on behalf of the claimant of the goods in this case.

"Then the jury come to consider what is the real issue which they are to determine, and that is whether these goods are whisky as known to the trade and to the community generally, and to those who deal in whisky. If it is not whisky, of course the case is made out in favor of the United States. If the jury believes—and there is a great deal of testimony to that effect—that the word 'whisky' is applied only to a distillate made of grain, that is an end of the case, an end of the defense in the case, their verdict must be for the United States, because it is admitted in this case, and it is not a question of dispute, that this liquor is not made from grain, but is a distillate of molasses with a slight infusion of sulphuric acid.

"But the jury might possibly find that it could be called whisky. Then there is a second question, can it be called Bourbon whisky? There is a great deal of testimony to show that 'Bourbon whisky,' in its most general sense, is a whisky made from grain of which corn is the larger constituent. If you find that this was not such a whisky, then it is not Bourbon whisky, and your verdict must be for the United States. Then there is testimony also to the effect that 'Bourbon whisky' as understood in the trade is confined to a whisky made in Kentucky. If you find that to be the fact—and that is for you to decide entirely on the testimony—if you

find that in the trade and among those who deal and who are familiar with the article 'Bourbon whisky' implies that it is made in Kentucky, then of course that is an end of the case so far as the claimant is concerned, because it is admitted that this liquor was made in New Orleans.

"I might say that a good deal has been said about the hardship and injustice of condemning an article which once has been branded by the gauger, but I do not think that that appeals very strongly to any one's sense of morality, because a gauger is not a man who is to decide what is the trade name of an article. He takes that largely from the distiller. He is not a dealer in liquor, nor is he a man of science who is to determine once for all, and incontestably, whether it is what it is branded, or something else.

"I will now give you the instructions asked for by the counsel for the United States. The first prayer is as follows:

"The jury are instructed that if from the evidence they shall find the word "whisky" as understood by scientific men, the liquor trade, and the public generally is confined to a distillate of grain, and shall further find that the contents of the barrels libeled in this case is a distillate of molasses, and that the said barrels were branded Bourbon whisky, then the said barrels were misbranded, and their verdict must be for the libellant."

"The second prayer has reference to the restricted meaning of 'Bourbon whisky,' as applying to whisky distilled in the State of Kentucky. It is as follows:

"The jury are instructed that if they shall find from the evidence in this case that the phrase Bourbon whisky as defined in the standard works of reference in use in this country, and as understood by scientific men, the liquor trade, and by the public generally, imports a liquor distilled in the State of Kentucky, and shall further find that the contents of the barrels libeled in this case were distilled in New Orleans, in the State of Louisiana, and shall further find that the said barrels were branded Bourbon whisky, then the barrels were misbranded, and their verdict must be for the libellant."

"The third prayer has reference to what you may find from the evidence is the more general acceptance of the words 'Bourbon whisky,' and that does not necessarily require that it shall be made in Kentucky. The instruction is as follows:

"The jury are instructed that if they shall find from the evidence that the phrase Bourbon whisky as understood by scientific men, the liquor trade, and the public generally is confined to a distillate of grain made from the mixture of fermented grain, of which mixture corn constituted the greater part, and shall find that the contents of the barrels libeled in this case are a distillate of molasses, and shall further find that the said barrels are branded Bourbon whisky, then the said barrels are misbranded, and their verdict must be for the libellant."

"I do not think that there is anything that I need say to the jury

further, except to remind you that there is no dispute at all as to the material out of which this distillate was made. The whole case, in my judgment, and I so instruct you, turns upon whether the general acceptance of the word 'whisky' imports that it is made from grain. Of course this liquor was not so made.

"Further, in regard to Bourbon whisky, if the term 'Bourbon whisky,' implies that the article was made of corn in greater part—not made of molasses but made of grain of which corn was the greater part—then of course it was misbranded.

"So, further, if you find that 'Bourbon whisky' is confined to whisky made in Kentucky, and of grain, and that the larger constituent part must be corn, then of course this would not be 'Bourbon whisky,' because it was not so made.

"As to what the testimony has convinced you are the proper meanings, accepted by the trade and by scientific men, of 'whisky' and 'Bourbon whisky,' these are facts to be found by you from the testimony, which I leave entirely to you. It is my duty to instruct you upon the law and to leave the facts to be found by you."¹

§ 388. Whisky Compounds.

"The labeling of whisky compounds, under the Food and Drugs Act of June 30, 1906, will be governed by the opinion of the Attorney-General, dated December 1, 1908, published herewith.

"James Wilson,

"Secretary of Agriculture.

"Washington, D. C., December 4, 1908."

"December 1, 1908.

"The Honorable the Secretary of Agriculture.

"Sir: I am duly in receipt of your letter of this date. In this you call my attention to a passage in my opinion of April 10, 1907, addressed to the President, which passage is in the words following:

"I conclude that a combination of whisky with ethyl alcohol, supposing, of course, that there is enough whisky in it to make it a real compound and not a mere semblance of one, may be fairly called "whisky," provided the name is accompanied by the word "compound" or "compounded," and provided a statement of the presence of another spirit is included in substance in the title—

¹ N. J. 68.

and you ask me how much whisky there must be in a mixture of whisky and neutral spirits to fairly entitle this mixture to be called a 'compound' or 'compounded' whisky, or, as stated in your letter, 'whisky: a compound of pure grain distillates.'

"In the passage in question I stated that there must be, in any such a mixture, 'enough whisky . . . to make it a real compound and not a mere semblance of one.' In the absence of any legislative provision or judicial determination on this subject, the proportion of whisky necessary for the purpose in question can be stated only tentatively and for the time being; and a selection of any particular fraction of the whole as a necessary proportion must be, at least in appearance, somewhat arbitrary. I have, however, very carefully examined the evidence on this subject submitted by your department, and after full consideration of such evidence, have reached the conclusion that, until better informed in the premises from the action of the Congress or of the courts, this department will not advise a prosecution on the ground of violation of law in using any one of the three labels above suggested or any substantial equivalent therefor when the amount of whisky in the mixture equals or exceeds one-third in volume of the spirituous content; that is to say, in the case you mention, one-third of the whisky and neutral spirits combined.

"Very respectfully,

"Charles J. Bonaparte,

"Attorney-General."

§ 389. Wine.

Wines shipped to various purchasers were labeled as follows:

1. Those shipped by The A. Schmidt, Jr., & Bros. Wine Company:
 - a. "Claret Wine—containing harmless coloring and one-tenth of one percent benzoate of soda."
 - b. "Vino Type Claret Wine—containing harmless coloring and one-tenth of one percent benzoate of soda."

c. "Vino Puro—Nagherea—A. Cusamano, New Orleans, La., containing harmless coloring and one-tenth of one percent benzoate of soda.

d. "Vino Corvo Claret—A. Cusamano & Co., New Orleans, La., containing harmless coloring and one-tenth of one percent benzoate of soda."

2. Those shipped by The Sweet Valley Wine Company:

a. "X Ohio Sweet Catawba Wine—Serial 124. Guaranteed under the National Pure Food and Drugs Act. Containing one-sixteenth of one percent benzoate of soda, sweetened with cane sugar and pure saccharin. Made 1906-1907."

b. "X—Port Wine Type—Serial 124. Guaranteed under the National Pure Food and Drugs Act. Containing harmless coloring and one-sixteenth of one percent benzoate of soda. Sweetened with cane sugar and pure saccharin. Made 1906-1907."

c. "A—Ohio Red Wine Vino Type—Serial 124. Guaranteed under the National Pure Food and Drugs Act. Containing one-sixteenth of one percent benzoate of soda. Made 1906-1907.

d. "Ohio Claret Medoc Type Wine—Serial 124. Guaranteed under the National Pure Food and Drugs Act. Containing harmless coloring and one-sixteenth of one percent benzoate of soda.

3. Those shipped by John G. Dorn:

a. Claret Wine—Serial No. 3255. Guaranteed under the National Pure Food and Drugs Act. Containing harmless coloring and one-tenth of one percent benzoate of soda."

b. "Vino Type—Serial No. 3255. Guaranteed under the National Pure Food and Drugs Act. Containing harmless coloring and one-tenth of one percent benzoate of soda."

c. "Vino Type—Serial No. 3255. Guaranteed under the National Pure Food and Drugs Act. Containing one-tenth of one percent benzoate of soda."

Samples of each of the several brands included in the aforesaid shipments were analyzed and it was found that:

The wines designated as "Claret Wine," and "Vino Type Claret Wine," and "Vino Puro-Nagherea," and "Vino Corno Claret," and "Vino Type" consisted of a fermented solution of commercial dextrose artificially colored with a dye, preserved with benzoic acid.

The wine designated as "X Ohio Sweet Catawba Wine" consisted of a fermented solution of commercial dextrose and sucrose, artificially sweetened with saccharin, preserved with benzoic acid.

The wine designated as "X Port Wine Type" consisted of a fermented solution of commercial dextrose and cane sugar,

artificially colored with a coal tar dye, sweetened with saccharin. There was present only 10.36 percent of alcohol, a quantity much below that in true port wine.

The wine designated as "A Ohio Red Wine Vino Type" consisted of a fermented solution of commercial dextrose or starch sugar, artificially colored with a coal tar dye and preserved with benzoic acid.

The wine designated as "A Ohio Claret Medoc Type Wine" consisted of a fermented solution of commercial dextrose, artificially colored with a coal tar dye, preserved with benzoic acid.

In the opinion of the Department of Agriculture, wine is the product made by the normal alcoholic fermentation of the juice of sound ripe grapes, and the usual cellar treatment, and contains not less than seven (7) nor more than sixteen (16) percent alcohol, by volume, and in one hundred (100) cubic centimeters (20° C.) not more than one-tenth (0.1) gram of sodium chlorid nor more than two-tenths (0.2) gram of potassium sulphate, and red wine is wine containing the red coloring matter of the skins of grapes.

It was therefore held that the products analyzed disclosed that they were not made from the juice of grapes and were artificially colored to simulate true wines, and were not entitled to be labeled "wine."¹

"The question has arisen whether fermented beverages made in the States of Ohio and Missouri by the addition of a solution of sugar and water to the natural juice of grapes before fermentation may be labeled, under the Food and Drugs Act, as 'Ohio Wine,' or 'Missouri Wine,' respectively, without further qualification. In Food Inspection Decision 109 it was announced that the term 'wine' without qualification is properly applied only to the product made from the normal alcoholic fermentation of the juice of sound, ripe grapes without addition or abstraction, except such as may occur in the usual cellar treatment for clarifying and aging.

"It has been decided after a careful review that the pre-

¹ F. I. D. 83.

vious announcement is correct and that the term 'wine' without further characterization must be restricted to products made from untreated must without other addition or abstraction than that which may occur in the usual cellar treatment for clarifying and aging. However, it has been found that it is impracticable, on account of natural conditions of soil and climate, to produce a merchantable wine in the States of Ohio and Missouri without the addition of a sugar solution to the grape must before fermentation. This condition has recognition in the laws of the State of Ohio, by which wine is defined to mean the fermented juice of undried grapes, and it is provided that the addition, within certain limits, of pure white or crystallized sugar to perfect the wine or the use of the necessary things to clarify and refine the wine, which are not injurious to health, shall not be construed as adulterations and that the resultant product may be sold under the name 'wine.' Furthermore, it is permitted in some of the leading wine-producing countries of Europe to add sugar to the grape juice and wine, under restrictions, to remedy the natural deficiency in sugar or alcohol, or an excess of acidity, to such an extent as to make the quality correspond to that of wine produced, without any admixture, from grapes of the same kind and vintage in good years. It is conceived that there is no difference in principle in the adding of sugar to must in poor years to improve the quality of the wine than in the adding of sugar to the must every year for the same purpose in localities where the grapes are always deficient.

"In view of this practice, and having regard to the fact that fermented beverages have been produced in the States of Ohio and Missouri by the addition of a sugar solution to grape must before fermentation and sold and labeled as 'Ohio Wine' and 'Missouri Wine,' respectively, for a period of over sixty years, it is held a compliance with the terms of Food Inspection Decision 109 if the product made from Ohio and Missouri grapes by complete fermentation of the must under proper cellar treatment, and corrected by the addition of a sugar solution to the must before fermentation

so that the resultant product does not contain less than five parts per thousand acid and not more than 13 percent of alcohol after complete fermentation, are labeled as 'Ohio Wine' or 'Missouri Wine' as the case may be, qualified by the name of the particular kind or type to which it belongs.

"An Ohio or Missouri dry still wine made as above stated and sweetened with a sugar solution which does not increase the volume of the wine more than 10 percent, and fortified with tax-paid spirits, may be labeled as 'Ohio Sweet Wine, or 'Missouri Sweet Wine' as the case may be, qualified by the name of the particular kind or type to which it belongs.

"The product made in Ohio and Missouri by the addition of water and sugar to the pomace of grapes from which the juice has been partially expressed, and by fermenting the mixture until a fermented beverage is produced, may be labeled as 'Ohio Pomace Wine' or 'Missouri Pomace Wine' as the case may be. If a sugar solution be added to such products for the purpose of sweetening after fermentation they should be characterized as 'Sweet Pomace Wines.' The addition to such products of any artificial coloring matter or sweetening or preservative other than sugar must be declared plainly on the label to render such products free from exception under the Food and Drugs Act."²

To brand a domestic wine as "Extra Sherry" is to hold out the impression that it was made in Spain, and it is misbranded.³ And to brand a domestic wine "Extra Port Wine" conveys the impression that it was made in Portugal; and so is misbranded.⁴ To apply the term "Hockheimer" to an American wine is to misbrand it.⁵ A domestic wine was labeled on the neck of the bottle "Sparkling Vin Rouge R. Sec. Burgundy," and the following principal label below: "R. Vin Rouge Sec. Sparkling Burgundy Type, Ripin & Company, New York." And this consignment had on the neck of the bottle "Cuvee

² F. I. D. 120. See also F. I. D. 109 below.

³ N. J. 737.

⁴ N. J. 737. A wine having in it glucose and benzoate of soda can

not be labeled "port wine" unless those ingredients be stated on the label. N. J. 824.

⁵ N. J. 711.

Rervee White Label R. & Co.," and the following principal label: "R. & Co., White Label Extra Dry Champagne, Ripin & Co., New York," with which latter was packed a certificate reading "Ripin's White Label is a pure Champagne of Superior quality. It is refreshing and highly exhilarating and is invaluable in cases of convalescence from exhaustive diseases, for a weak stomach and all forms of indigestion." An examination showed that the first wine was a very highly charged red wine and the second a highly artificial carbonated wine. Neither of them was of foreign origin nor bottle fermented. It was held that both wines were mislabeled.⁶ To label a wine as made with grape sugar when it was made with starch sugar is to misbrand it.⁷ In an instance of misbranding a domestic white wine artificially carbonated and labeled "Champagne," the court trying the case said: "The term 'Champagne' when used alone and apart from any qualifying or descriptive words is commonly understood to describe an effervescent and sparkling wine produced in a province of France, the gas therein being the result of natural fermentation. It is therefore thought that a bottle containing wine produced in California and labeled 'Champagne' without any other qualifying or descriptive words, tends to mislead and deceive and is 'misbranded' under the provisions of the pure food Act. It is further thought that a bottle containing a wine having substantially the same qualities as the champagne manufactured in France and produced substantially in the same way, although originating in California should not be held to be misbranded if it is labeled 'California Champagne,' or by some other device conspicuously displayed in connection with the word champagne, purchasers are clearly advised that the bottle does not contain a product of France."⁸

⁶ N. J. 828.

⁷ N. J. 1016.

⁸ N. J. 1020 The label on the neck of each bottle in five cases contained the words "Champagne Brand Dufleur Fils & Cie.

Grand Vin Royal. Guaranteed under the Pure Food and Drugs Act, June 30, 1906. Serial No. 7016," with a design of a fancy coat of arms. The label on the neck of each of the bottles in five other

"On June 30, 1909, a hearing was held before the Secretary of Agriculture and the Board of Food and Drug Inspection on the labeling of Ohio and Missouri wines. After giving full consideration to the data submitted, the board is of the opinion that the term 'wine' without modification is an appropriate name solely for the product made from the normal alcoholic fermentation of the juice of sound ripe grapes, without addition or abstraction, either prior or subsequent to fermentation, except as such may occur in the usual cellar treatment for clarifying and aging. The addition of water or sugar, or both, to the must prior to fermentation is considered improper, and a product so treated should not be called 'wine' without further characterizing it. A fermented beverage prepared from grape must by addition of sugar would properly be called a 'sugar wine,' or the product may be labeled in such fashion as to clearly indicate that it is not made from the untreated grape must, but with the addition of sugar. The consumer is, under the Food and Drugs Act, entitled to know the character of the product he buys.

"Evidence was offered on the preparation of 'wine' from the marc. In these cases it appeared customary to add both water and sugar to the marc and sometimes to use sac-

cases contained the words "Extra Dry," with a design of a crown, and the main label on each of the bottles contained the words "Crown Champagne," with the designs of a crown and crossed scepter, and underneath the words "Guaranteed under the National Pure Food and Drugs Act, June 30, 1906." The labels on the neck of each of the bottles in two other cases had upon them the words "Extra Dry Champagne," with a design of a shield and the monogram A. F. W. and the main label on each bottle contained the words "Cuvee Special E. L. Mercier & Cie. Brand,

Extra Dry. Guaranteed under the Pure Food and Drugs Act, June 30, 1906. Serial No. 7016." Of these labels the court said: "Specifically I find that the label on each of the three bottles received in evidence in support of the three several counts of the indictment, is misleading. Considering the form and dress of each package as a whole there is little room for doubt upon the part of the originator to create in the minds of the consumers the impression that they are purchasing a foreign and not a domestic product." N. J. 1020.

charin, coloring matter, preservatives, etc., to make a salable article.

"In the opinion of the board no beverage can be made from the marc of grapes which is entitled to be called 'wine' however further characterized, unless it be by the word 'imitation.' The words 'Pomace Wine' are not satisfactory, since the product is not a wine in any sense, but only an 'imitation wine' and should be so labeled."

"A hearing was held on March 21, 1910, before the Secretary of Agriculture and the Board of Food and Drug Inspection on the labeling of wines produced in California, which for many years have been known as 'California Port' and 'California Sherry,' respectively.

"It is the view of the department that the terms 'Port' and 'Sherry' without qualification are properly applied only to the products from Portugal and Spain, respectively, but it is held that domestic ports and sherries are not misbranded if the terms 'Port' or 'Sherry,' as the case may be, are qualified by the name of the State where the wine is produced."¹⁰

§ 390. Wintergreen Essence.

A liquid marked "Essence of Wintergreen" containing less than one-half the necessary amount of wintergreen and a dilute preparation substituted in its place, is mislabeled.¹ A food product was labeled as follows: "1 oz. Net Weight McMurray's Country Club Brand Extract of True Wintergreen. Natural Fruit Flavor of Perfect Purity. Manufactured by Wm. McMurray & Co., Minneapolis & St. Paul," and "One Ounce Full Measure McMurray's Country Club Brand Wintergreen Extract. Manufactured by Wm. McMurray & Co., Minneapolis-St. Paul." It was held that it was misbranded.²

§ 391. Yando Egg Noodles.

A substance labeled "Yando Egg Noodles" which does not

¹ F. I. D. 109.

¹ N. J. 293.

¹⁰ F. I. D. 122.

² N. J. 764.

contain sufficient egg to justify the use of the word "egg" in its description is mislabeled.¹

§ 392. Yeast.

"On August 3, 1909, a hearing was held before the Board of Food and Drug Inspection on the application of the Food and Drug Act of June 30, 1906, to the sale in interstate commerce of compressed yeast. Other investigations along the same line have been made by the Department, and as a result of the hearing and of these investigations the position of the Department is:

"1. That the term 'compressed yeast,' without qualification, means distillers' yeast without admixture of starch.

"2. That if starch and distillers' yeast be mixed and compressed such product is misbranded if labeled or sold simply under the name 'compressed yeast.' Such a mixture or compound should be labeled 'compressed yeast and starch.'

"3. That it is unlawful to sell decomposed yeast under any label."¹

ART. III.—DRUGS AND MEDICINES.

SEC.	SEC.
393. Drugs—statute.	drugs and also for technical and other purposes.
394. Names to be employed in declaring the amount of the ingredients.	403. Use of the word "compound" in names of drug products.
395. Alcohol.	404. Refilling drug bottles and cartons.
396. Statement of quantity or proportion of alcohol present in drug products.	405. False statements concerning curative or remedial effects of proprietary medicines.
397. Declaration of the quantity or proportion of alcohol present in drug products.	406. False representations concerning curative qualities—Departmental decisions.
398. Drug derivatives.	407. Puffing remedies—"Cure All"—Departmental decisions.
399. Substances in drugs required to be named.	408. Article named on label present in only very small quantity.
400. Formula or label of drugs.	
401. Physicians' prescriptions.	
402. Products used as foods and	

¹ N. J. 686.

¹ F. I. D. 111.

§ 393. Drugs—Statute.

“For the purposes of this Act an article shall also be deemed to be misbranded:

“In case of drugs:

“First. If it be an imitation of or offered for sale under the name of another article.

“Second. If the contents of the package as originally put up shall have been removed, in whole or in part, and other contents shall have been placed in such package, or if the package fail to bear a statement on the label of the quantity or proportion of any alcohol, morphine, opium, cocaine, heroin, alpha or beta eucaine, chloroform, cannabis indica, chloral hydrate or acetanilide, or any derivative or preparation of any such substances contained therein.”¹ The Regulations provide that a drug may be labeled “by any name recognized in the United States Pharmacopoeia or National Formulary. No other description of the components or qualities is required, except as to content of alcohol, morphine,” etc., and the other articles named in the statute above quoted.² If a drug be recognized in either one of these two authorities by two or more names, the use of one of such names is sufficient. If it is not recognized in them, then the trade name of the article must be used. But it must be borne in mind that a name of one substance or drug can not, under any conditions, be used for another substance or drug, even though it be known to the trade by the description used. An imitation of a drug is not permitted, even if it be stated to be an imitation. In fact, it is difficult to see, even of a simple compound drug, how there can be an imitation of a drug. An article is either the drug it purports to be or it is not such. In the case of medicines, which are nothing more than compound drugs, imitations, even if plainly stated to be such, are not permitted. But “no statement regarding a drug can be false or misleading in any particular within the meaning of the Act, unless it relates to some one or more of

¹ Section 8.

² Regulation 19.

the various particulars expressly enjoined or prohibited by the Act.”³

§ 394. Names to be Employed in Declaring the Amount of the Ingredients.

“Many inquiries are coming to this Department relative to the names that may be employed in declaring the quantity or proportion of the ingredients, as required by Congress.

“The following are representative:

“The word “alcohol” has received so much unfavorable notoriety during the last few years that we hesitate to place it upon our labels. Could we not employ some other words in place of it, such as “cologne spirits,” “spirits of wine,” “pure grain alcohol,” etc.?

“Would it be satisfactory for us to use “Phenylacetamide,” or the following formula, $C_6H_5NH(CH_2CO)$, for the chemical acetanilide?

“One of our preparations contains trichlorethidene ethyl alcoholate, which would undoubtedly under the law be considered a derivative of chloral hydrate. Will it be satisfactory for us to use this name on our trade packages in giving the amount of this chemical present in the product?

“In the manufacture of some of our products we use opium. It would, however, be a financial loss to state this fact on the label. Could we not say this preparation contains twenty grains of the concentrated extract of papaver somniferum to the fluid ounce?

“Dover’s powder is mentioned in the regulations as one of the preparations of opium. It would seem at first glance that Dover’s powder as a preparation, if mentioned on the label, would be all that could be required as to opium.”

“One of the objects of the law is to inform the consumer of the presence of certain drugs in medicines, and the above

³ United States v. American Druggists’ Syndicate, 186 Fed. 387.

“The purpose was to protect the public against deception in the purchase of drugs and food by punishing adulteration and misbranding as therein defined. If the label on a drug is not false or misleading in any of the particulars enjoined or prohibited by Section 8, no of-

fense is committed under that section.” Ibid.

The statute does not apply to circulars enclosed with the preparation or drug. Ibid. But it probably would if each circular was wrapped around the package with the design or intention that it take the place of a label.

terms do not give the average person any idea as to the presence or absence of such drugs. In enumerating the ingredients, the quantity or proportion of which is required to be given upon the principal label of any medicinal preparation in which such ingredients may be present, the Act uses **only** common names, and the permission to use any but such common names for any ingredients required to be declared upon the label is neither expressed nor implied in any part of the law.

“The term used for acetanilide is ‘acetanilide,’ and not phenylacetamide. No reference is made to the use of the chemical formula in designating the presence of chemicals. The words ‘chloral hydrate’ appear in the Act, but not the chemical name trichlorethidene glycol. It can readily be seen that if the Act were not closely adhered to in this connection there would soon be such a confusion and multiplicity of names and phrases that one of the objects of the Act would be defeated.

“The names to be employed in stating the quantity or proportion of the ingredients required by the Act to appear on the label of all medicinal preparations containing same are:

“First. Those used in the law for the articles enumerated; example, ‘alcohol,’ not ‘spiritus rectificatus.’

“Second. In the case of derivatives: (a) The name of the parent substance used in the Act should constitute part of the name; example, ‘chloral acetone,’ not ‘trichlorethidene dimethyl ketone.’ (b) The trade name, accompanied in parentheses by the name of the parent substance; example, ‘dionine (morphine derivative.)’

“Third. Names of preparations containing the name of some ingredient used in the Act. In such cases the name used in the Act should constitute the first portion of the name of the preparation. (See F. I. D. 55.)

“Fourth. Common names (such as laudanum, Dover’s powder, etc.) of preparations containing an ingredient enumerated in the law, provided such name or names are accompanied in parentheses by some such phrase as ‘preparation of opium’ or ‘opium preparation,’ followed by the num-

ber of minims or grains, as specified in the regulations; for instance, 'laudanum (preparation of opium), 40 minims per ounce.'¹

"The jury are instructed that, in determining the meaning of the words 'brain-food,' 'cure,' 'poisonous' and 'harmless,' the definition of which has been called into question by this inquiry, they are to give such words their ordinary and customary meaning as understood by the general public, and not a technical meaning, as given by any expert witness. This law was passed not to protect the experts especially, not to protect scientific men who knew the meaning and the value of drugs, but for the purpose of protecting ordinary citizens, like the jury, and like counsel and others, who have learned during the hearing of this trial a great deal more about these things than they ever knew before in all their life.

"In determining the meaning of the words used upon these cartons, bottles, and circulars, they are to be taken in the way that an ordinary, plain, common citizen, without scientific knowledge, would understand them if they were put before him.

"And so with regard to this 'Cuforhedake,' you can take it to mean what an ordinary man would take it to mean—the meaning which it conveys to an ordinary person when he gets a remedy said to be a cure for headache. The first prayer as presented to me on the part of the Government touches that subject. I do not know that it is necessary for me to read it to you again. It has been read three times. If that word, spelled in the two different ways that it is spelled, would convey to the ordinary citizen the idea that it was a food for the brain as contradistinguished from the idea of a food for the whole body, then it is—and I so charge you in this first prayer—misleading, and therefore a violation of the law; and if you find that such a definition is what the ordinary citizen would apply to it, then you, under that first prayer, would be compelled to bring in a verdict of guilty,

¹ F. I. D. 56.

and you have the right, in considering that question, to take it in the connection in which it is placed. You have the right to consider that it is on a medicine which it is claimed is a cure for headache, an ache which is supposed by most citizens to be from the brain, and the words brain food spelled in the two different ways you have had demonstrated to you so many times are used in connection with a cure which is said to cure the headache—an ache that is seated in the head. You have a right to consider all that. How would an ordinary citizen, in taking that up and seeing these words, understand it? What would he understand by the use of those words?

“I have granted some other prayers where the subject of brain food is referred to.

“Mr. Baker: If Your Honor please, when you read the other ones, will you spell out the words?

“The Court: The jury are further instructed that if they find from the evidence that the use by the defendant of the name ‘branefude’ as a part of the name of the defendant’s preparation was not reasonably or fairly calculated to deceive or lead to the belief that the preparation was a food for the brain, then they shall find that the use by the defendant of the word ‘branefude’ was not false or misleading. That is the question that I suggested to you a moment ago. How would the ordinary citizen, upon reading that, understand it? If it would mislead him or have a tendency to mislead him, then the case is made out. If there is nothing in the term in the way in which it is used that would mislead an ordinary citizen, then, of course, that, under the prayers that I have granted, is to be taken into consideration by you.

“Mr. Baker: Would Your Honor read the first prayer now?

“The Court: I will read, at the request of counsel, the first prayer:

“‘If the jury find from the evidence beyond a reasonable doubt (and you gentlemen are old jurors, and understand perfectly well what is meant by a reasonable doubt; I need not again charge you on that point, because you have had that

charge over and over again. The doubt must be a reasonable one—one that a reasonable man would entertain from the evidence), that the defendant Robert N. Harper, on the fifth day of August, 1907, or at any time between the first day of January, 1907, and the date of the filing of this information, in the District of Columbia, did manufacture a certain liquid medicine or preparation, styled and designated "Harper's Cuforhedake Brain Food," or "Harper's Cuforhedake Brane Fude," and did place on the bottle, box or circular thereof the following statements, designs and devices, or any of them, viz., "Cuforhedake Brain Food" or "Cuforhedake Brane Fude," unless you further find from the evidence that there is a known and distinct kind of food that feeds and nourishes the brain as distinguished from a food that feeds and nourishes the whole body, and that the said drug or preparation is a food, and that it feeds and nourishes the brain particularly, as distinguished from a food that nourishes all parts of the body, then the jury are instructed as a matter of law that the words "Brain Food" and "Brane Fude"—if you find that "Brane Fude" means "Brain Food"—are false and misleading, and your verdict shall be guilty on the first count of the information; and if the jury find that the defendant did sell or offer for sale to the said Stone & Poole, on the date within the time mentioned and in the District of Columbia, the said drug in this prayer described, they shall find the defendant guilty on the fourth count of the information.'''²

§ 395. Alcohol.

The term "alcohol," as used in the statute and regulations, means the common or ethyl alcohol, or, in other words, alcohol made from grain. "No other kind of alcohol is permissible in the manufacture of drugs except as specified in

² N. J. 25.

Under the recent decision of the Supreme Court (see § 406), false representation concerning the curative properties of a remedy, placed

on a label, is not an offense, and these instructions can not, probably, be regarded now as a proper statement of the law.

the United States Pharmacopoeia or National Formulary."¹ Wood alcohol or denatured alcohol can not be used in hair tonics, liniments or other preparations for either internal or external use. The percentage of grain alcohol in foods need not be stated.²

§ 396. Statement of Quantity or Proportion.

A drug "is misbranded in case it fails to bear a statement on the label of the quantity or proportion of any alcohol, morphine, opium, heroin, cocaine, alpha or beta eucaine, chloroform, cannabis indica, chloral hydrate or acetanilide, or any derivative or preparation of any such substances contained therein." "A statement of the maximum quantity or proportion of any such substances present" is sufficient, if "the maximum stated does not vary materially from the average quantity or proportion." "In declaring the quantity or proportion of any of the specified substances the names by which they are designated in the Act shall be used; and in declaring the quantity or proportion of derivatives of any of the specified substances, in addition to the trade name of the derivative, the name of the specified substance shall also be stated, so as to indicate clearly that the product is a derivative of the particular specified substance."¹ In case the actual quantity or proportion be stated it must be the average quantity or proportion, but a reasonable variation from the stated weight for individual packages is allowed if the variation is as often above as below the weight or volume stated.² In the case of alcohol the average percentage by volume in the finished product must be given when stating the "quantity" or "proportion;" and in other ingredients required to be named on the label, the number of grains or minims per ounce or fluid ounce must be stated, "and also, if desired, the metric equivalents therefor, or milligrams per gram or per cubic centimeter, or grams or cubic centimeters per kilogram or per liter;" but if the maximum of quantity

¹ Regulation 28.

² F. I. D. 47.

¹ Regulation 28.

² Regulations 28 and 29.

or proportion be stated,³ then the article is not deemed misbranded.⁴ It is only in the finished product that the quantity or proportion of the substances therein must be named. If during the manufacture of the product substances are eliminated, they need not be stated.⁵ If the substance or a derivative of it is present in the finished product, only as a mere "trace," as chemists term it, then it need not be stated on the label; but if present in any material quantity or proportion sufficient to enable its presence to be determined with certainty by analysis, then a statement of the amount must be placed on the label. If a medicine be put up in tablets, powder or capsules, then the quantity or proportion must be stated in grains or in minims per ounce (or as specified if the metric system be used), which is in each tablet, powder or capsule.

§ 397. Declaration of the Quantity or Proportion of Alcohol Present in Drug Products.

"The question of stating the percentage of alcohol present in drug products has caused a multitude of inquiries. The following questions along this line serve as examples:

'Is it necessary to give the amount of alcohol present in U. S. Pharmacopoeial or National Formulary products? It seems to me that such a requirement is absurd, and not contemplated within the spirit of the Act. None of them are patent medicines. Will I be compelled to tell how much alcohol is present in such goods?

'If we apply for and obtain a serial number, must we in addition to putting this number on our labels state the percent of alcohol?

'Will it be necessary to give the percent of alcohol present in such products as ether, chloroform, collodion, spirit of nitrous ether, and similar preparations?

"The law is specific on the subject of declaring the amount of alcohol present in medicinal agents, as can readily be seen from the following language: 'An article shall also be

³ As by Regulation 28.

⁴ Regulation 30.

⁵ It should be noted that the Department of Agriculture in the tak-

ing of samples to be analyzed must always take them from finished products, and not from products in the course of manufacture.

deemed misbranded . . . if the package fail to bear a statement on the label of the quantity or proportion of any alcohol . . . contained therein.' No medicinal preparations are exempt, whether they are made according to formulae given in the U. S. Pharmacopoeia or National Formulary or formulae taken from any other source. The serial number, with or without the guarantee legend, does not exempt a preparation from this requirement. The law does not make any statement as to the amount of alcohol that may or may not be employed. It requires, however, that whatever amount be present shall be set forth on the label. The percentage of alcohol given on the label should be the percentage of absolute alcohol by volume contained in the finished product. The manner in which it should be printed is shown in F. I. D. 52."¹

§ 398. Drug Derivatives.

Regulation 29 defines what shall be considered as derivatives. Within the meaning of this Act a derivative is a substance which is so related to one of the specific substances "that it would be rightly regarded by recognized authorities in chemistry as obtained from the latter 'by actual or theoretical substitution,' and it is not indispensable that it should be actually produced therefrom as a matter of fact." The Board has the power, and has exercised it, to adopt a rule or regulation requiring the names of the specified substance to follow that of the derivative.¹

§ 399. Substances in Drugs Required to be Named.

In labeling drugs, the label must bear a statement "of the quantity or proportion of any alcohol, morphine, opium, cocaine, heroin, alpha or beta eucaine, chloroform, cannabis indica, chloral hydrate or acetanilide, or any derivative or preparation of any such substances contained therein."¹ The

¹ F. I. D. 54.

¹ Section 8.

¹ F. I. D. 112.

term "drug," as here used, includes all drug preparations and medicines, whether recognized by name in the United States Pharmacopoeia or National Formulary or not. This clause of the statute applies to all proprietary remedies or patent medicines containing any of the drugs named in the statute, as well as to all veterinary medicines and stock foods,² and preparations having or purporting to have medicinal properties for either internal or external use in the treatment or prevention of disease either in man or beast. Bitters is an example of this kind.³ In the Territories and District of Columbia this requirement applies to physicians' prescriptions,⁴ but it does not apply to alcohol used in any article of food, as flavoring extracts.⁵ It is only when the drug contains one of the substances above stated in the quotation that it is necessary to state its ingredients; if it contains an ingredient not thus enumerated it need not be stated on the label unless it be a derivative.⁶ These statutory names should be used on the labels, and not substitutes. The Department has given the following opinion on this question:

"Many inquiries are received as to the method of stating the quantity or proportion of preparations (containing opium, morphine, etc.) used in the manufacture of other preparations. Of these the following are typical:

"If the label on the bottle were to bear the words "Tincture of Opium," I reason that as this is a definite preparation, constituting a preparation of opium, and so definite as to its composition that to any intelligent person it expresses definitely all that it is desirable to express, the use of this title alone should be sufficient. I feel that as a preparation it is distinct from opium, and if this particular tincture is used in the manufacture of a preparation the mention of it alone should be sufficient.

"Where extract of tincture of cannabis indica, or extract of opium, is employed in making other drug products, would it not be complying with the law if the use of such article be clearly indicated on the label as prescribed by the law, or is it necessary to give the actual amounts of the drugs themselves represented by these preparations?"

² See F. I. D. 90.

³ F. I. D. 85.

⁴ F. I. D. 57.

⁵ F. I. D. 47.

⁶ F. I. D. 54; F. I. D. 55; F. I. D. 56; *United States v. American Druggists' Syndicate*, 186 Fed. 387.

"Names of drug products bearing any of the names of the ingredients enumerated in the Act are construed as representing 'preparations' within the meaning of the Act; and if the same are clearly declared upon the label, as required by Regulations 17 and 30, it will not be necessary to give the actual amount of the primary drugs used or represented by such article. It is desirable, however, that the word or words used in the law shall constitute the first part of the name of the product. For example: 'Opium, Tincture of;' 'Cannabis Indica, Extract of,' followed by the amount of tincture or extract used.'"

§ 400. Formula on Label of Drugs.

"Many inquiries are received relative to the necessity of giving the formula of medicinal remedies on the label. The following is typical:

"I should like to know if it will be necessary for me to state on a label the name of the products from which I prepare my proprietary medicine in order to conform with the Pure Food and Drugs Act. If I do this it will prohibit me from manufacturing and selling a remedy which is a secret of my own; and anyone buying it could, from the label, tell what ingredients were used in its preparation and make his own supply of this medicine. How does the United States Government expect to protect those who have secret medicinal preparations they wish to sell at a profit? If the Pure Food Commission desires, I will send them a sample bottle of my medicine for their inspection and approval.'

"The Food and Drugs Act, June 30, 1906, does not require the formula of drug products to be given on the label, but requires only that the quantity or proportion of the ingredients enumerated in the law, and derivatives and preparations of same (Regulation 28), shall be clearly set forth on the label or labels of all preparations used for the treatment or prevention of disease, either internally or externally, for man or other animals. This includes sample packages as well as regular trade packages.

¹ F. I. D. 55.

Peroxide contained in a substance need not be named on the

label. *United States v. American Druggists' Syndicate*, 186 Fed. 387.

“The question is also frequently asked whether a medicinal preparation would be exempt from the operation of the law if the formula were given on the label. The formula on the label is very desirable, but this information is not required by the law. The Act forbids the use of any statement, design or device in connection with any drug product which is false or misleading in any particular. A defect of this kind would not be corrected by giving the formula on the label. If the formula is given, it must be the correct and complete formula. It is held that, in addition to those substances required by the Act to be named, if only a part of the active medicinal agents used in the manufacture of a drug product are set forth on the label, such a procedure is misleading, and therefore forbidden by the law. All drug products and their labels must conform to the Act, whether the formula is or is not given on the label.”¹

§ 401. Physicians' Prescriptions.

“Packages resulting from the compounding of physicians' prescriptions under the Food and Drugs Act are the subject of many queries, of which the following are representative:

‘If a druggist compounds a physician's prescription and sends it into an adjoining State, will it be necessary to state upon the label the amount of alcohol, morphine, etc., that may be present?’

‘Supposing a regularly licensed practicing physician has patients located in various States of the Union and supplies medicines to them through the mails, by express, and otherwise, do such packages come under the provisions of the law, and, if so, can the required information be given in pen and ink on the label?’

‘We treat drug addictions on a very gradual tonic treatment reduction plan. For instance, if John Doe writes for information as to the home treatment for his addiction, I send him a symptom blank which contains, among other questions, an inquiry as to the kind of drug he uses, how he uses it, the length of time he has used it, etc. In addition to giving me a complete history of his case, he states he is using ten grains of sulphate of morphine (each twenty-four hours), hypodermically or internally, as the case may be. In prescribing in his case I immediately put him on just one-half of the amount he reports as his daily allowance, combining same with a bitter tonic.’

¹ F. I. D. 53.

'It is necessary for the reduction in drug cases to be made without the patient's knowledge. It is, of course, understood by all physicians that you can not trust a drug habitue to properly make his own reductions, for, as a matter of fact, if he knew to what extent I was reducing his daily allowance of opiates, he would imagine the reduction too rapid, he would get frightened, and would take to his former drug for relief. Treatment prepared in this way I do not think would come under the head of a proprietary preparation or a patent medicine, as I prescribe the contents of each bottle to meet the requirements of each individual patient. All instructions as to the conduct of treatment and the use of auxiliary remedies are given by letter; consequently there are no printed labels or cartons containing any claims concerning the efficacy of this treatment.

'I would be pleased to have you inform me whether in your opinion I would be violating the pure food law in any manner, shape, or form should I continue to label my preparations as I am now doing, and in having them prepared in ——— and forwarded direct to my patients in this and other States.'

If a package compounded according to a physician's prescription be shipped, sent, or transported from any State or Territory or the District of Columbia to another State or Territory or the District of Columbia by a compounder, druggist, physician, or their agents, by mail, express, freight or otherwise, the label upon such package is required to bear the information called for by Congress. If, however, the patient himself, or a member of his household, or the physician himself carries such package across a State line, and such package is not subject to sale, it is held that such package need not be marked so as to conform with the law, because such a transaction is not considered one of interstate commerce.

"The package may be marked so as to comply with the Act by either stamp, pen and ink, or typewriter, provided all such written matter is distinctly legible and on the principal label, as prescribed in Regulation 17."¹

§ 402. Products Used as Foods and Drugs and also for Technical and Other Purposes.

"Frequent requests for information relative to the proper

¹ F. I. D. 57.

labeling of products bearing the names of food and drugs, but used also for technical and other purposes, are received. The following are typical:

"We kindly ask you to advise us in regard to the new law that governs the line of oils. We manufacture a compound product, so-called "turpentine," which contains pure turpentine and a very fine petroleum product. It is used in most branches where pure turpentine is used, with the exception of medicinal purpose, for which we do not sell it.

"We understand that if we were to sell any cotton-seed oil so branded as to indicate that it was intended to be used as a food, as, for example, under the brand "Blank Salad Oil," it would be necessary to observe the requirements of the law referred to; but we are in doubt and would be glad to have your opinion as to whether a sale or shipment of this oil (for lubricating purposes) under the ordinary trade brand of cotton-seed oil, and without anything to indicate that it was of a quality suitable for use as a salad oil, would subject us to the provisions of the Act.

"During personal interviews the question of marking chemical reagents has also been discussed.

"Products used in the arts and for technical purposes are not subject to the Food and Drugs Act. It is, however, a well-recognized fact that many articles are used indiscriminately for food, medicinal and technical purposes. It is also well known that some products employed for technical purposes are adulterated or misbranded within the meaning of this Act. Inasmuch as it is impossible to follow such products into consumption in order to determine to what use they are finally put, it is desirable that an article sold under a name commonly applied to such article for food, drug and technical purposes be so labeled as to avoid possible mistakes. The ordinary name of a pure and normal product, whether sold for food, drug, technical or other purpose, is all that is necessary. Pure cotton-seed oil or turpentine may be sold without any restrictions whatever, whether such article is sold for food, medicinal or technical purposes, but it is suggested that a cotton-seed oil intended for lubricating purposes, or a so-called turpentine consisting of a mixture of turpentine and petroleum oils, used by the paint trade, be plainly marked so as to indicate that they are not to be employed for food or medicinal purposes. Such phrases as the

following may be used: "Not for Food Purposes," "Not for Medicinal Use," or for "Technical Purposes Only," or "For Lubricating Purposes," etc.

"In order to avoid complication it is suggested that chemical reagents, sold as such, be marked with such phrases as the following: 'For Analytical Purposes,' or 'Chemical Reagent,' etc."¹

§ 403. Use of the Word "Compound" in Names of Drug Products.

"Many inquiries are received concerning the use of the word 'compound' in names of drug products. There seems to be a general impression that this word can be applied as a connective to many misbranded products. The following extracts serve as examples:

"You have on file our formula (active agents—croton oil and cascara), and we would ask if it is possible to call the same "castor pill compound" and comply with the regulations?

"This liniment has been in use for forty years. The ingredients, each separately and collectively, are sanitary and highly curative. The one ingredient after which it was named happens to be present in the least proportion. Can not the compound be called by the name "Compound Sassafras Cream?"

"An eminent jurist writes:

"I shall be glad to know the views entertained by your Department as to when a druggist has satisfied this Act by a label or printed matter which he puts on the package or bottle in relation to a compound. Take, for example, the product put on the market as Cascarin Compound, or Aloin Compound. I am impressed with the fact that such label must have added a statement as to what the other ingredients of the compound are. This may not mean, and probably does not mean, that the formula must be given or the exact proportions, but a purchaser has the right to know what is in the compound in order to determine for himself, or to receive proper advice, as to whether it is safe to be used."

"In no case can a preparation be named after an ingredient or drug which is not present. The word 'compound' should not be used in connection with a name which in it-

¹ F. I. D. 58.

self, or together with representations and designs accompanying same, would be construed as a form of misbranding under the Act.

"It is held that if a mixture of drugs is named after one or more but not all of the active medicinal constituents (not vehicle) present in a preparation, the word 'compound' can be used in connection with the name, (a) provided the active constituent after which the product is named is present in an amount at least equal to that of any other active medicinal agent present. Example: If it is desired to make a mixture consisting of oil of sandalwood, balsam copaiba, and castor oil, and call this product 'Oil of Sandalwood Compound,' the oil of sandalwood should constitute at least 33 1-3 percent of the entire mixture. Or (b) provided the potent active constituent after which the product is named is present in sufficient amount to impart the preponderating medicinal effect. Example: If a product is named after the active constituent, strychnine, the strychnine or one of its salts should be present in sufficient amount to produce the preponderating medicinal effect of the preparation. Or (c) provided the complete quantitative formula, as outlined in the United States Pharmacopoeia and National Formulary, be given on the principal label. A declaration of the complete quantitative formula, however, does not exempt the manufacturer or dealer from giving the information required by the Act in the manner prescribed by the regulations. The ounce shall be the unit. The amounts of the ingredients present (excepting alcohol, which is to be stated in percent) shall be given in grains or minims, and if it is desired the metric equivalent may be given in addition."¹

§ 404. Refilling Drug Bottles or Cartons.

To remove the contents of a bottle or carton containing a drug and then refill it with the same kind of a drug, but not with that taken out, is to misbrand it, even if properly labeled when the original contents was put in it. A removal

¹ F. I. D. 63.

in part, and then refilling, is prohibited. But the refilling must be for the purpose of trade; a refilling for one's own use is not prohibited. Yet no penalty is incurred in the case of a refilled bottle unless it is put in interstate commerce, for merely to refill a bottle, even though for local trade, is no offense against this statute. If such an act is to be prohibited, it must be by a State law. However, if the bottle be refilled in the District of Columbia or in a Territory, then the statute is violated, even though intended or used in local trade. A bottle refilled and shipped out of the State may be treated as an original package, even though it originally was one of several bottles placed in a case and then removed, refilled and shipped alone. If the labels be removed entirely, then it may be refilled.

§ 405. False Statements Concerning Curative or Remedial Effects of Proprietary Medicines.

It has been the practice of the Department of Agriculture to condemn all proprietary medicines bearing false statements concerning their curative powers, and many judgments have been entered in District Courts condemning such medicines. As a rule these judgments have been entered upon pleas of guilty. But the Supreme Court of the United States has decided recently¹ that the statute did not cover false representations concerning the curative or remedial effect of such a medicine which does not import any statement concerning identity. The court said that the fact that, under section four, the determination whether an article is misbranded is left to the Bureau of Chemistry of the Department of Agriculture did not authorize the Board to determine the medical effect of a medicine, but only to determine the question of its ingredients.² This decision necessarily overturns all the decisions of the Department of Agriculture

¹ May 29, 1911.

² United States v. Johnson, 31 Supt. Ct. 627, § 405.

It is not necessary to give the reasoning by which the court ar-

rived at this conclusion; it is sufficient to give the conclusion. The court affirmed United States v. Johnson, 177 Fed. 313, which had quashed the indictment.

and of lower courts, holding that false representations concerning their curative powers placed upon proprietary drugs or medicines were within the condemnation of the statute; but we have deemed it best to give the general result of these decisions in the next two sections, as well as the several instances in the next article on Drug and Medicine Decisions, calling attention in a note to each particular decision which, in the author's opinion, contravenes the Supreme Court decision. An earlier decision of the Circuit Court for the Eastern District of New York anticipated this Supreme Court decision about six weeks,³ the court saying on this point: "The purpose was to protect the public against deception in the purchase of drugs and food by punishing adulteration and misbranding as therein defined. If the label on a drug is not false or misleading in any of the particulars enjoined or prohibited by section eight, no offense is committed under that section. By no possible construction can the terms of the Act be extended to such a boundless field of inquiry as that involved in the reality of the remedial effects claimed for a drug. Such an inquiry could be pursued only through the opinions of contending experts and the experience of those who had used the article, and a conclusive determination could seldom, if ever, be reached. At all events, it is sufficient to say that the Act discloses no purpose to hold manufacturers and vendors of preparations like the one in issue to criminal responsibility for misstatement as to their curative or remedial effects."⁴

³ It was rendered April 11, 1911.

⁴ *United States v. American Druggists' Syndicate*, 186 Fed. 387, citing *United States v. Johnson*, 177 Fed. 313, which was afterwards affirmed by the Supreme Court.

"The scope of the general terms of the definition of misbranding in Section 8, 'any statement, design or device regarding such article or its ingredients or substances contained therein which shall be false or mis-

leading in any particular,' must be ascertained by construing them in connection with the subject-matter and other provisions of the Act. It includes in the first place, not only statements concerning the ingredients or substances contained in the article, but certain other statements 'regarding such articles.' What such statements are appears in the case of drugs in the paragraph immediately following

**§ 406. False Representations Concerning Curative Qualities
—Departmental Decisions.**

The Department of Agriculture has held that false representations made concerning the alleged curative properties of headache cures is a mislabeling of the article when put upon

the definition of misbranding; for instance, drugs in imitation of or offered for sale under the name of another article. The only possible ground for doubting this construction arises from the manner in which the general definition of the term misbranding is followed, in the case of drugs by specifications which purport to be additions. The remainder of Section 8, dealing with the case of food, is perfectly clear. The first three paragraphs specifying the particulars other than statements regarding the ingredients or substances contained therein, which shall be deemed misbranding, and then follows the general provision covering any statement 'regarding the ingredients or the substances contained therein, which shall be false or misleading in any particular.' Having regard to the fact, however, that the general definition of the term 'misbranded' is expressly applicable to both food and drugs, it does not appear that the difference in phraseology and form of arrangement of the specific provisions for the two articles affects their substantial equality in scope. It is clear that the section does not have reference to the ingredients or substances contained therein, or to any of the particulars specified in the section in the case of drugs. The same process of reasoning discloses the scope of the

phrase 'false or misleading in any particular.' If there is any appreciable difference in the import of the words false and misleading, the scope of the latter term is to be found in the specific provision of this section in the case of drugs; for instance, where the label fails to state, as required, the quantity or proportion of alcohol contained therein. No statement regarding a drug can therefore be false or misleading in any particular within the meaning of the Act, unless it relates to some one or more of the various particulars expressly enjoined or prohibited by the Act." *United States v. American Drug-gists' Syndicate*, 186 Fed. 387.

"Having regard to the intentment of the whole Act, which is to protect the public health against adulterated poisons, and deleterious food, drugs, etc., the labeling or branding of the bottle or container, as to the quantity or composition of 'the ingredients or substances contained therein which shall be false or misleading,' by no possible construction can be extended to an inquiry as to whether or not the prescription be efficacious or worthless to effect the remedy claimed for it. Permitting any expression of opinion as to how far Congress may go in the direction claimed under this indictment, it is sufficient to say that this legisla-

the label.¹ These decisions can not longer be regarded in the enforcement of the statute or in construing it, but it is deemed best to here give the rules followed by that Department and by some of the District Courts. On the contrary, Judge Phillips, of the District Court of the United States for the Western Division of the Western District of Missouri, has held that the vendor of a certain product called a "Blood Purifier," "Cancerine Tablets," and also the following was not liable to the Pure Food and Drugs statute: "Guaranteed Under the Pure Food and Drugs Act, June 30, 1906. Serial No. 18131. Contains Not More than 20 Percent Alcohol. Doctor Johnson's Mild Combination Treatment for Cancer. Blood Purifier. This is an effective Tonic and Alterative. It enters the circulation at once, utterly destroying and removing impurities from the blood and entire system. Acts on the Bowels, Kidneys and Skin, eliminating poi-

tion, predicated on the commerce clause of the Federal Constitution, it must be conceded, presses the power of the general government close to the confines of limitations. In the debates in Congress, when this measure was under consideration, it was never sought to be justified except on the ground of protecting the public health, as it might be affected by interstate shipments of food, drugs, etc. At no time was it asserted or pretended that it was proposed to reach the matter of holding the manufacturers and vendors of prescriptions or patented medicines, multitudinous and multiform as they are, to criminal liability for misstatements as to the curative or remedial effects of the prescription, which would necessarily depend upon the opinions of contending experts and the users of the nostrums. As this is a criminal statute, creating a new offense, it must be strictly construed and applied.

It must be restrained as to its expression, reasonable intentment; otherwise, the courts, by mere construction, may extend its operations far beyond the legislative intent. If it had been the mind of Congress to make it an indictable offense for such manufacturers or vendors by their labels or brandings on bottles and packages to mislead the buyer as to the curative or healing properties of the drugs, as to the mere matter of commendation, apt words, both in the title and body of the Act, could and should have been easily employed to indicate such purpose, and not leave it to the courts by strained construction, to read it into the statute." *United States v. Johnson*, 177 Fed. 313.

¹ N. J. 709; N. J. 708; N. J. 707; N. J. 643; N. J. 633; N. J. 631; N. J. 630; N. J. 624; N. J. 233 N. J. 182; N. J. 266; N. J. 366; N. J. 636; N. J. 908; N. J. 919; N. J. 931; N. J. 941; N. J. 986.

sons from the system, and when taken in connection with the Mild Combination Treatment gives splendid results in the treatment of Cancer and other malignant diseases. I always advise that the Blood Purifier be continued some little time after the cancer has been killed and removed and the sore healed. Recommended in all conditions associated with impure blood, poor digestion and non-assimilation of food; also poor circulation, weak heart, etc. Directions: Shake well. Take one teaspoonful in a little cold water before each meal, three times a day. Do not take in too large doses. The best results can be obtained only where it is taken as directed. Forty-five drops usually make a teaspoonful. Please count and see that your teaspoon is not too large. Prepared for and distributed by Doctor Johnson Remedy Company, 1233 Grand Avenue, Kansas City, Mo.," were not such representations as fall within the Pure Food law, although false. Judge Phillips, in rendering his opinion, in answer to the claim that the label on the bottle as to the curative or remedial effect of its contents is a misbranding within the meaning of the statute, if, in fact, the prescription be ineffectual for the purpose indicated, said: "This, it seems to me, is an entire misconception of the term 'misbranding' as used in the Act. The language, 'the package or label of which shall bear any statement, design or device regarding such article, or the ingredients or substances contained therein, which shall be false or misleading in any particular,' must be read and interpreted, so as to have regard to its context, and is to be restrained by the subject matter of the Act.

"Having regard to the intentment of the whole Act, which is to protect the public health against adulterated, poisonous and deleterious foods, drugs, etc., the labeling or branding of the bottle or container, as to the quantity or composition of 'the ingredients or substances contained therein which shall be false or misleading,' by no possible construction can be extended to an inquiry as to whether or not the prescription be efficacious or worthless to effect the remedy claimed for it. Pretermittting any expression of opinion as to how far Congress may go in the direction claimed under this indict-

ment, it is sufficient to say that this legislation, predicated of the commerce clause of the Federal Constitution, it must be conceded, presses the power of the general government close to the confines of limitation.

"In the debates in Congress, when this measure was under consideration, it was never sought to be justified except on the ground of protecting the public health, as it might be affected by interstate shipments of food, drugs, etc. At no time was it asserted or pretended that it was proposed to reach the matter of holding the manufacturers and vendors of prescriptive or patented medicines, multitudinous and multiform as they are, to criminal liability for misstatements as to the curative or remedial effects of the prescription, which would necessarily depend upon the opinions of contending experts and the users of the nostrums.

"As this is a criminal statute, creating a new offense, it must be strictly construed and applied. It must be restrained to its expressed, reasonable intendment, otherwise the courts, by mere construction, may extend its operation far beyond the legislative intent. If it had been the mind of Congress to make it an indictable offense for such manufacturers and vendors, by their labels or brandings on bottles and packages, to mislead the buyers as to the curative or healing properties of the drugs, as to the mere matter of commendation, apt words, both in the title and body of the Act, could, and should, have been easily employed to indicate such purpose, and not leave it to the courts by strained construction to read it into the statute.

"The motion to quash is sustained."²

A preparation was labeled "Gowan's Pneumonia Cure." It was charged that it was mislabeled in these particulars:

"1. On a green circular inclosed in the carton and surrounding each of the bottles containing this drug, and thereby made a part of the labels descriptive of the said preparation, occurred this statement: 'It is entirely different from any other remedy, containing new principles never before

² N. J. 266.

applied; consequently, it can not be substituted;' which said statement was then and there false and misleading in this, that all the ingredients in said preparation were and are well and commonly known, and are constantly applied, singly or in combination, in the very manner directed by the instructions accompanying this preparation, and commonly used for the affections of the lungs, throat and other portions of the body similarly affected.

"2. On a green circular inclosed in the carton and surrounding each of the bottles containing this drug, and thereby made a part of the labels descriptive of said preparation, occurred this statement: 'Supplies an easily absorbed food for the lungs that quickly effects a permanent cure;' which statement was false and misleading in this, that there is no such thing as a food for the lungs separate and apart from a food that nourishes the whole body.

"3. On a white circular, also inclosed in the carton and surrounding each of the bottles containing the drug, and thereby made a part of the labels descriptive of said preparation, occurred this statement: 'It was endorsed and advertisement accepted by the American Medical Journal, as a valuable therapeutic agent;' which statement was false and misleading in this, that the said preparation was never advertised in the American Medical Journal and was never endorsed by the said American Medical Journal.

"The information charged a further misbranding, in that the labels printed upon the cartons containing the bottles filled with this preparation did not bear a statement of the quantity of opium contained in said preparation in a manner that could be easily read by the purchaser; but the statement of the amount of opium contained therein was printed in inconspicuous type in such an inconspicuous place that the proper notice of the poisonous contents of said preparation was not easily conveyed to the purchaser or person to whom it might be transferred."

The defendant pleaded guilty to the charge of mislabeling the product.³

³ N. J. 180.

§ 407. Puffing Remedies—"Cure-All"—Departmental Decisions.

The Department of Agriculture and some of the lower courts have rendered the following decisions, but which are overturned by the decision of the Supreme Court. To represent a medicine as an "unexcelled" cure for a particular disease, when it is excelled by others, is a false statement and brings it within the bar of the statute. Thus, to say that certain tablets are "unexcelled in pneumonia," when they are excelled by other remedies in the treatment of pneumonia, is such a statement as the law does not permit.¹ Where the following statement was false the tablets were condemned: "Break-Up-The-Grip Tablets, for la grippe, colds, headache, all forms of neuralgia, rheumatic and malarial pains. Price 25 cents. Manufactured by J. D. Langham, Holley, N. Y. The great laxative grippe cure; cures colds and grippe in one day. We claim these tablets to be the best in the world for la grippe, colds, headaches and all pains and fevers, where pleasant and speedy relief is desired. They leave no depressing results so common to most remedies now on the market which are recommended for these complaints. They will break up la grippe, colds, headache and neuralgia promptly and save you hours of pain. Dose: One or two tablets. Repeat in one, two or three hours, as may be required by the nature and severity of the affection for which they are taken. Children, $\frac{1}{2}$ to one tablet, according to age. Will cure headache in ten minutes." On the end of the boxes containing this product there were stamped in small, indistinct type, by means of a rubber stamp, "Each tablet contains 2 grs. acetanilid." With said product there was packed a printed circular of directions, relating and referring to said product, which said circular bore, among other statements, the following, to wit: "Break-Up-The-Grip Tablets, a new, pleasant and safe remedy for the cure of la grippe and all pains. They will positively cure la grippe, neuralgia, headache (in all forms), rheumatic pains, malarial pains,

¹ N. J. 708.

etc.; they contain no injurious ingredients, and we warrant them to give satisfaction or money will be refunded."² So where the legend on a medicine sold was as follows: "The Mother's Friend. For the relief of the suffering incident to child birth. The Bradfield Regulator Company, Sole Proprietors, Atlanta, Ga. . . . This is one of the greatest friends to those expecting to be confined. It is a remedy upon which confidence can be placed, one that will assist in a safe and quick delivery, and one that shortens the duration of labor." A circular packed with the product bore the following statements: "We offer you . . . an agent which will, if used as directed, invariably alleviate in a most magical way the pains, horrors and risks of labor, and often entirely do away with them. It not only shortens labor and lessens the pain attending it, but it greatly diminishes the danger to the lives of both mother and child. It leaves her much less liable to floodings and convulsions and other alarming symptoms which so frequently follow the birth," and statements that it was a "remedy upon which confidence could be placed, one that will assist in a safe and quick delivery, and one that shortens the duration of labor," and that it would "invariably alleviate in a most magical way the pains and risks of labor, and often entirely do away with them," were false, it was held that there had been a case of mislabeling.³ A like ruling has been had in case of an alleged headache cure,⁴ and of an alleged microbe killer.⁵ A product was labeled as follows:

"NYAL'S COMPOUND EXTRACT OF DAMIANA.

"Each fluid ounce represents, alcohol, fifty percent coca, fifteen gr., damiana seventy-six gr., nux vomica four gr., phosphorus thirty-five one-thousandths gr.

"Useful as an aphrodisiac and for the restoration of virility in debility of the reproductive organs of both sexes.

"Damiana is a nonirritating sexual tonic.

² N. J. 707; F. I. D. 54.

630; N. J. 908; N. J. 919; N. J.

³ N. J. 636.

931; N. J. 941; N. J. 986.

⁴ N. J. 633; N. J. 631; N. J.

⁵ N. J. 623.

"Coca exalts the intellectual faculties.

"Prepared for the New York and London Drug Co. (incorporated), New York, U. S. A."

The statement concerning its usefulness was false, for, as a matter of fact, the article did not contain the aphrodisiac qualities ascribed to it, and it had no value in that respect. It was held that the article was misbranded.⁶

§ 408. Article Named on Label Present in Only Very Small Quantity.

It is not a misbranding to state that an article which the statute does not require to be mentioned or named on the label as contained in the substance labeled is present when it is present in only a very small quantity, and that quantity is not stated. A statement that a particular substance is present in the drug labeled need not be made unless it is one of the substances the statute specifically requires to be stated, namely: "The quantity or proportion of any alcohol, morphine, opium, cocaine, heroin, alpha or beta eucaine, chloroform, cannabis indica, chloral hydrate or acetanilide, or any derivative or preparation of any such substances contained therein." In one instance the label contained a statement that the article labeled contained "Peroxide" and was "Peroxide Cream." In the information it was charged that this was a misbranding, "in that the label then and there bore statements, designs and devices regarding the said article, and the ingredients and substances contained therein, which were false and misleading, in that the words 'Peroxide Cream' represented that peroxide is an important ingredient of the article, whereas, in truth and in fact, the article then and there contained only an indication of a small quantity of some peroxide, which said quantity is insignificant." But this was held not to be a misbranding, the court saying: "It appears upon the face of the information that the prepara-

⁶ N. J. 345; N. J. 245.

See Lopez Specific Special Com-

pound. N. J. 816; California Water of Life 830.

¹ Section 8.

tion in question contained some peroxide. There was no statement on the label as to the quantity or proportion,² nor does the Act require any such statement in the case of peroxide. Certainly, then, the label was not false.³ But the information alleges that the label is 'false and misleading,' in that the words 'Peroxide Cream' represent that peroxide is an important ingredient, and tend to lead the purchaser to believe that peroxide is an important ingredient of the article, whereas, in truth and in fact, the article then and there contained only an indication of a very small quantity of some peroxide, which said quantity is insignificant." It is asserted (and it is a fair inference) that the label tends to lead purchasers to believe that peroxide is present to such extent that the antiseptic and healing qualities of peroxide may be obtained from its use; and it is argued that such is not the fact, and therefore the label is misleading. In other words, the government contends that the statement on the label with reference to the remedial effect of the article is a misbranding within the meaning of the Act, because the article is, in fact, ineffectual for the purpose indicated. Assuming that the information is sufficient as a pleading to raise such an issue, this contention is based upon an entire misconception of the scope and purpose of the Act. The purpose was to protect the public against deception in the purchase of drugs and food by punishing adulteration and misbranding as therein defined. If the label on a drug is not false or misleading in any of the particulars enjoined or prohibited by section eight, no offense is committed under that section."⁴

² The statute declares it to be a misbranding "if the package fail to bear a statement on the label of the quantity or proportion of any alcohol, morphine, opium, cocaine, heroin, alpha or beta eucaine, cannabis indica, chloral hydrate or acetanilide, or any derivative or prep-

aration of any substance contained therein." Section 8.

³ Citing *In re Wilson*, 168 Fed. 566 and *United States v. Boeckmann*, 176 Fed. 382.

⁴ *United States v. American Druggists' Syndicate*, 186 Fed. 387.

ART. IV.—DRUG AND MEDICINE DECISIONS.

SEC.

- 409. Acetanilide—Ascentenoid.
- 409a. Ammon Phenyl.
- 410. Anadol.
- 411. Analgine tablets.
- 412. Aniseed syrup.
- 413. Antimalarico, Ferro-China.
- 414. Apple phosphate.
- 415. Asafoetida.
- 416. Asthma cure.
- 417. Az-Ma-Syde.
- 417a. Balsam.
- 418. Beaver and oil compound.
- 419. Bitters.
- 420. Blackberry cordial.
- 421. Brant's Soothing Balm.
- 422. Bromo Febrin.
- 423. Buchu gin.
- 424. Cafe-Coca compound.
- 425. Calcium acid phosphate.
- 426. Camphor.
- 427. Cancer cure.
- 428. Cascara—Castor oil.
- 429. Catarrh and hay fever remedy.
- 430. Celery Cola.
- 431. Cocaine.
- 432. Cocaine hydrochloride.
- 433. Cod liver oil.
- 434. Coke extract.
- 435. Cola Queen syrup, "Red Seal."
- 436. Cold and grippe tablets—laxative.
- 437. Colocynth.
- 438. Cough cure—"Kickapoo Cough Cure."
- 438a. Cramp Drops.
- 439. Damiana.
- 440. Dandruff cure.
- 440a. Diphtheria cure.
- 441. Eyelin.
- 442. Febrisol, Tilden's.
- 443. Gin-Seng-Gin.
- 444. Grippe cure—Colds.

SEC.

- 445. Hair coloring.
- 446. Hair tonic.
- 446a. Haarlem Oil.
- 447. Headache cure.
- 448. Hydrogen peroxide.
- 449. Injurious drug.
- 449a. Jamaica Ginger.
- 449b. Kamola.
- 450. Koca-Nola — Kola-Ade — Kos-Kola.
- 451. Kurakoff.
- 452. Laudanum.
- 453. Lopez Specific Special Compound.
- 454. Make-Man tablets.
- 455. Microbe killer.
- 456. Morphine—Opium.
- 457. Mother's Friend.
- 458. Muco-Solvent.
- 458a. Peppermint.
- 459. Peroxide Cream.
- 459a. Pink Root.
- 460. Pine oil compound.
- 461. Pneumonia cure.
- 462. Quinine Whisky.
- 463. Radol.
- 464. Rock Candy Drips and Whisky.
- 464a. Rheumatic cure.
- 465. Saltpetre.
- 466. Seidlitz Salts, German.
- 466a. Senna.
- 467. Skin food.
- 467a. Sodie Aluminic Sulphate.
- 468. Soemnoform.
- 469. Soothing syrup.
- 470. Sporty Days Invigorator.
- 471. Sulphur liquid—Germicide.
- 472. Teething syrup.
- 472a. Tobacco Specific.
- 473. Tonic.
- 474. Tragacanth gum.
- 475. Turpentine.

SEC.

476. Vermouth.

477. Wine of Coca.

477a. Wintergreen extract.

SEC.

478. Wiseola.

479. Witch Hazel.

§ 409. Acetanilid—Ascentenloid.

A representation that a preparation contained ascentenloid, when it did not, but did contain acetanilid, is misleading.¹

§ 409a. Ammon Phenyl.

A drug product was labeled as follows: "Ammon Phenyl, Trade Mark, Antipyretic Antiseptic, Antineuralgic, Antiseptic Puritas et Potentia. Non Plus Ultra Stimulant, Laxative, International Chemical Company, New York, U. S. A. Keep well corked and beware of substitutes. . . . For Physicians' Prescriptions only. 1 oz. 5-grain Tablets Ammon Phenyl. Ammoniated Pheno Acetyl, $C_6H_5NH_2$, Stimulant, Antipyretic, Analgesic, Antineuralgic, Antiseptic, Antirheumatic, Antispasmodic, Expectorant, Antacid, Sedative, Hypnotic, etc. Dose.—Five to fifteen grains, according to age. (0.33—1 gr.) Manufactured only by the International Chemical Co., New York, U. S. A., London, Paris, Vienna, Berlin, Amsterdam, Brussels, Milan, St. Petersburg, Montreal, Madrid, Mexico, Geneva, Melbourne, Buenos Ayres, Lisbon, Stockholm, Calcutta, Rio Janeiro." Packed with the product was a circular which contained the following statements: "Ammon Phenyl is one of the acetyl derivatives of aniline of the Amido-Benzene Series whose base is $C_6H_5NH_2$, combined by our own special chemical process with ammonia. The presence of ammonia tends to overcome the depressing effects usually observed in the other Coal Tar derivatives, such as Antipyrine, Phenacetine, Acetanilide, etc., and it can be used in conditions of vital depression where these drugs would be contra-indicated. Cyanosis and Collapse never appear after its use. Uses. In Pneumonia, Phthisis, Influenza, Typhoid Fever, Epilepsy, Erysipelas, Opium Habit, Convulsion of Infants, Rheu-

¹ N. J. 708; N. J. 707; N. J. 449.

matism (Acute or Chronic), Senile Gangrene, Scarlatina, Diphtheria, Angina Pectoris, in Weak, Irritable or Dilated Heart. In Croupous Pneumonia it has been observed that it not only reduces the temperature, but has a favorable influence on the pathological process in the lung, while the ammonia as is well known, has a tendency to prevent blood clot in the ventricle, a very frequent cause of death in this disease." A sample was analyzed by the Bureau of Chemistry, United States Department of Agriculture, and it was found to contain acetanilid, sodium bicarbonate, and ammonium carbonate. As the findings of the analyst and report thereon indicated that the product was misbranded within the meaning of the Food and Drugs Act of June 30, 1906, a criminal information was filed in the District Court of the United States for the District of New Jersey, charging the drug product was misbranded because the statement appearing in the label and circular that the product was "one of the acetyl derivatives of aniline of the Amido-benzene series, whose base is $C_6H_5NH_2$, combined by our own special process with ammonia," obscured the real origin and nature of the product, in fact but a mixture of acetanilid, sodium bicarbonate, and ammonium carbonate, and not a chemical compound; in that the statement "The presence of ammonia tends to overcome the depressing effects usually observed in other coal tar derivatives, such as Antipyrine, Phenacetine, Acetanilide, etc.," was false and misleading, as the preparation does possess the depressing effects of acetanilid; and in that the statements following the word "Uses," in the circular above referred to as to the therapeutic properties of the preparation, were false and misleading, as the product is not capable of effecting the beneficial physiological results therein claimed for it, but would in many of the disorders enumerated prove harmful, and its use would be contraindicated. The defendant entered a plea of non vult to the above information, whereupon the court imposed a fine.¹

¹ N. J. 942.

§ 410. Anadol.

A drug was labeled as follows: "Anadol. Antipyretic and Anodyne. Useful in Neuralgia, Typhoid Fever, La Grippe, Sciatica, Acute Rheumatism, Hernicrania; also Headache and allied affections. It reduces temperature and relieves pain without subsequent ill effects. Dose—Three or ten grains, or one or two tablets. Can be safely used in from twenty to sixty grains during twenty-four hours. Wheeler Chemical Works, Chicago, Ill., Guaranteed . . . Serial No. 10249." Samples from this shipment were procured and analyzed by the Bureau of Chemistry, United States Department of Agriculture, with the following results: 0.2531 substance gave, caffeine 1.33 percent, acetanilid 82.72 percent, equivalent to 361.9 grains per ounce; 0.3009 substance gave, caffeine 1.29 percent, acetanilid 82.75 percent, equivalent to 362 grains per ounce. This drug was held to be mislabeled.¹

§ 411. Analgine Tablets.

A substance labeled "Analgine Tablets," which contains acetanilid, and which does not show the quantity or proportion of the acetanilid contained in it, is not correctly labeled.¹

§ 412. Aniseed Syrup.

A substance was labeled as follows: "Gauvin's Aniseed Syrup. . . . Each fluid ounce contains $\frac{1}{4}$ grain of acetate of morphine and 6% of alcohol. J. A. E. Gauvin, Dispensing Chemist, 850 St. Catherine St., East Montreal, Branch Lowell, Mass." "Gauvin's Syrup of Aniseed is preeminently the Children's Remedy. It cures colic, dysentery, coughs and colds. . . . Gauvin's Syrup of Aniseed always brings relief and is quite harmless. It differs from the majority of remedies claiming to be of the same character in containing nothing injurious to the health. It does not hurt either the digestion

¹ N. J. 795. So far as the statements concerning its curative powers are concerned, the statement did not fall within the provisions of the statute. See § 406.
¹ N. J. 276.

nor the nervous system . . .” Samples from this shipment were procured and analyzed by the Bureau of Chemistry, United States Department of Agriculture, and the product was found to be a hydro-alcoholic solution of morphin derivative, sugar, oil of anise flavoring, and undetermined matter. The drug was adjudged mislabeled.¹

§ 413. Antimalarico, Ferro-China.

A drug was labeled as follows: “Halt Maker without an equal The King of Appetizer An urgent necessity Supply yourself at once The Ferro-China Antimalarico is the most igienic of Bitters; it stimulates the appetite and promotes digestion Is the only Healt Maker Without an Equal. It as withstood the severe test of public approval for over ten years and because of its wonderful curative powers is now recognized as the leading family medicine of the day. That’s why we urge you strongly to give it a trial, especially if you suffer from Indigestion, Dyspepsia, Flatulency, Nausea, Poor Appetite, Sick Headache, Biliousness, Costiveness, Malaria, or Female Troubles. You’ll never find a better medicine to cure you. Thousands of men Women have said so and the following are a sample of the grateful letters we receive.” An examination made by the Bureau of Chemistry, United States Department of Agriculture, of samples from this shipment, showed the product to contain 16.12 percent alcohol, and to contain no quinine. As it appeared from the findings of the analyst and report made that the product was misbranded within the meaning of the Food and Drugs Act of June 30, 1906, the drug was adjudged misbranded.¹

§ 414. Apple Phosphate.

A quantity of apple phosphate was labeled as follows:

¹N. J. 773. So far as representations concerning its curative properties are concerned, this decision can not now be regarded as an authority; but the remainder of it stands. See § 406.

PURE FOOD—33.

¹N. J. 745. So far as the representations concerning its curative properties are concerned this decision is no longer an authority. See § 406.

"Samples of this shipment were procured and analyzed by the Bureau of Chemistry, United States Department of Agriculture, with the following results: Alcohol by volume 7.41 percent, solids 3.22 percent, reducing sugars (after inversion) 1.70 percent, direct polarization $+4.4^{\circ}$, invert polarization $+4.4^{\circ}$, ash 0.125, alk. of sol. ash 10.9 cc, alk. insol. ash 4.0 cc, insol. ash 0.025, soluble ash by difference 0.00, P_2O_5 in sol. ash 3.3 mg, P_2O_5 in insol. ash 5.2 mg, total acidity (as malic) 0.412, volatile acid 0.022, fixed acids 0.362, reducing sugars direct 1.64." It was held that the product was both adulterated and misbranded.¹

§ 415. Asafoetida.

A package labeled "Asafoetida" which contains much foreign matter can not be labeled "Asafoetida."¹ Such is the case where nut hulls are mixed with it.²

§ 416. Asthma Cure.

A drug product was labeled as follows: "Dr. B. W. Hair's Asthma Cure Guaranteed under the Food and Drugs Act, June 30, 1906. Serial 3085. Of the drugs required to be named by the above Act the only one entering into this preparation is alcohol, of which it contains not to exceed 18 percent in volume. Prepared by Dr. B. W. Hair, Hamilton, O. Price per bottle \$1.00." Packed with the product was a circular on which the following statement, among others, appeared: "Follow directions. . . . If strictly followed a cure may be surely expected." Samples from this shipment were procured and analyzed by the Bureau of Chemistry, United States Department of Agriculture, and the product was shown to contain alcohol by volume 18.48 percent, non-volatile material 9.15 percent, including 5.54 percent potassium iodide, and glycerine and water. It was held that this product was misbranded.¹

¹ N. J. 796.

¹ N. J. 583.

² N. J. 157.

¹ N. J. 837. So far as represen-

tations concerning this drug's curative properties are concerned, this can not be regarded as an authority. See § 406.

§ 417. Az-Ma-Syde.

A drug product was labeled as follows: "Az-Ma-Syde (copyrighted). To cure asthma use only in Az-Ma-Syde atomizer, three times a day and during each attack. Follow directions in Az-Ma-Syde booklet carefully. Asthma Remedy & Mfg. Co. Cornelia, Ga." Samples from this shipment were procured and analyzed by the Bureau of Chemistry, United States Department of Agriculture, and the product was found to be a dark brown liquid slightly alkaline in reaction with the odor of thymol, wintergreen and phenol, and containing $4\frac{1}{2}$ grains cocaine hydrochloride to the ounce and about 2 percent of alcohol. As the findings of the analyst and report made showed that the product was misbranded within the meaning of the Food and Drugs Act of June 30, 1906, it was adjudged misbranded.¹

§ 417a. Balsam.

A product was labeled "Indian Tar Balsam," as a cough and croup cure. An analysis of it showed it to consist of about 60 percent oil (indicating tar), and an aqueous solution 40 percent, the oil floating and being partly volatile, with an odor of tar, and the aqueous solution containing morphine derivatives and some unimportant substances dissolved from the tar. It was held to be misbranded, because the label contained no statement of the morphine in it.¹

§ 418. Beaver and Oil Compound.

The term "Beaver Oil Compound" signifies that it is compound of beaver oil, and if it is not an animal oil, but a gaso-line solution of oleoresin of capsicum, oil of sassafras and a small percentage of nonvolatile matter not animal oil, it is mislabeled.¹

¹ N. J. 727. The representations that it will cure asthma can not now be considered in determining

whether the drug was mislabeled. See § 406.

¹ N. J. 898.

¹ N. J. 239.

§ 419. Bitters.

Bitters made in this country can not carry this label:

"Italy Fernet-Branca Dei Fratelli Branca E. Comp. Milano via Broletto N 35 Vecino Alla Chiesa di S. Tomaso Fernet-Branca Fili Branca Milan L. Gandolfi & Co., New York, Sole Importers for the U. S., Mex., Canada, Cuba and Porto Rico."¹

A product was labeled as follows: "Cocainized Pepsin Cinchona Bitters, a true tonic and a speedy remedy for indigestion or dyspepsia, chronic diarrhoea, dysentery, colic, and flatulency, fever and ague, chronic affections of the urinary organs, asthma and bronchitis, very efficient in migraine, neuralgia, and in all morbid conditions due to depression of the nervous and cerebral systems. Prepared by R. W. Davis Drug Co., Chicago, U. S. A. Label Registered. This compound contains not more than 30 percent alcohol, bottled by R. W. Davis Drug Co. Guaranteed under the provisions of the Food and Drugs Act of June 30, 1906. This compound contains 5 percent of the extracts of roots, herbs, and spices, Syrup 2 percent, malaga wine 4 percent, essence of pepsin $\frac{1}{2}$ of one percent, caramel $\frac{1}{2}$ of one percent. . . . It stimulates respiration and the brain by increasing its blood supply, increases the heart's action, and under its daily use, a considerable extra amount of labor can be borne without suffering. It will purify the blood. Bones, muscles and nerves receive new force . . ." Samples from this shipment were procured and analyzed by the Bureau of Chemistry, United States Department of Agriculture, and the product was found to be a light-brown liquid, consisting essentially of alcohol 26.8 percent, by volume, nonvolatile material 4.53 percent, including quinine and other alkaloids from extract of cinchona bark, cocaine and other alkaloids from extract of coca leaves, sugar, caramel, capsicum, tannin, and extractives; the balance of the product consisted of water and a small quantity of oil of cinnamon. The total alkaloids amounted to 0.005 percent. The presence of pepsin could not be established. As it appeared from the findings

¹ N. J. 483.

of the analyst and report made that the product was misbranded within the meaning of the Food and Drugs Act of June 30, 1906, it was adjudged that it was misbranded.² A drug product was labeled: "Fernet-Branca Dei Fratelli Branca E. Comp." An analysis of it showed it contained 47.5 percent alcohol, and of this 22 percent was of the kind known as ethyl and 78 percent of the kind known as methyl alcohol. The product was of domestic manufacture. It was held that it was misbranded.³ A drug product was labeled "Fernet-Milan Process Bitters, Tonic and Digestive. The only one who possesses the excellent process of manufacturing it." An analysis showed that it contained 23.80 percent alcohol. Inasmuch as it failed to bear a statement on the label of the quantity of alcohol in it, it was held to be mislabeled.⁴ Another sample of this same bitters was adjudged mislabeled. It was labeled as follows, on bottle (in Italian and translated into English): "Fernet Branca of the Branca Bros. & Co., Milan No. 35 Broletto St., near the Church of St. Thomas. The goods possesses the real and genuine process recognized and approved by various testimonials of teachers in the medical profession. Facilitates digestion, impedes the irritation of the nerves and excites in a marvelous manner the appetite. It is recommended to those suffering from intermittent fever and worms and has an astonishing effect on the bad feelings produced by the spleen, as well as sour stomach and headache caused by bad digestion and old age. Should be taken every hour. A spoonful of the liquid in two of water, good wine, coffee, etc. Increase the quantity when the effect is not promptly produced. To avoid imitations every label bears the firm name of Branca Brothers & Company, with its trade mark, and the dry tin top will be secured upon every bottle with another label carrying the same firm name. Fernet-Branca. Fili Branca-Milan (Italy) L. Gandolfi & C. New York. Sole importers for the United States, Mexico, Canada, Cuba and Porto Rico;" on circular: "A specialty of Fratelli Branca of Milan. For those hypochondriacs who generally

² N. J. 735. See N. J. 745.

⁴ N. J. 743.

³ N. J. 726.

suffer from nausea, vomiting and wind, the use of Fernet-Branca is the real panacea. . . . It causes the most obstinate vomit to cease, is an excellent antiseptic, cures disorders of the liver and milt, prevents and overcomes intermittent fevers, those arising from swamps and malaria, as well as gastric fevers. . . . Fernet-Branca is especially powerful against those ailments which precede the development of cholera, and in curing those indispositions which linger in persons who have recovered from the epidemic." Samples from this shipment were procured and analyzed by the Bureau of Chemistry, United States Department of Agriculture, and the product was found to contain alcohol by volume 41.4 percent, residue (nonvolatile) 3.71 grams per 100 cc, ash 0.05 gram per 100 cc, a resin-like body (a bitter principle).⁵

"In section six of the Food and Drugs Act of June 30, 1906, the term 'drug,' as defined in the Act, includes 'all medicinal preparations recognized in the United States Pharmacopoeia or National Formulary for internal or external use, and any substance or mixture of substances intended to be used for the cure, mitigation or prevention of disease in either man or other animals.'

"Notwithstanding this comprehensive definition, it appears from a large correspondence on this subject that there is still some uncertainty as to whether or not certain commodities should be classed as drug products, and of this type are the alcoholic products known as 'bitters.'

"It is necessary to determine definitely whether or not 'bitters,' for example, are to be classed as drugs. This is necessary for the reason that under section eight of the Food and Drugs Act a drug is deemed misbranded 'if the package fails to bear a statement on the label of the quantity or proportion of any alcohol . . . contained therein.'

"On investigation of labels that are found on 'bitters' it has been discovered that in most cases they are recommended for various ailments. For example, they are said to 'aid di-

⁵ N. J. 839.

gestion,' 'allay irritation of the nerves,' 'excite the appetite to a marvelous degree,' 'prolong life.' Again, labels bear the statements, 'is not only a delicious beverage, but also a wonderful tonic,' 'valuable in intermittent fever, illness due to the spleen, stomach catarrh, diarrhoea, colic, cramps, vomiting, hypochondria, etc.' These are examples of common phrases found on labels. 'Bitters' are frequently prescribed in the same manner as medicines in general. For example, 'to be taken in tablespoons full every hour,' 'increase the dose if the effect is not immediate,' etc.

"It is well known that certain substances may be used both as foods and as drugs. It is claimed by some that certain products advertised as medicinal products are not sold and consumed on account of their medicinal properties, but merely as alcoholic beverages. This, however, does not seem to be consistent with the information found on some of the labels.

"In a case of this kind the classification will be made from a study of the literature published in connection with the article and by ascertaining the uses to which it is put. When a 'bitters' is described on the carton or label attached to the bottle, or any advertising matter accompanying the package, as possessing any medicinal or tonic properties, or if in fact it does possess such value, it must of necessity be classed as a drug product, and, in consequence of this classification, bear a statement of the quantity or proportion of any alcohol contained therein. The method of stating the proportion of alcohol is that of percent by volume, as suggested in Regulation 28 of Circular 21 of the Office of the Secretary. In Food Inspection Decision 52 is the suggested order in which the statements required by law should occur on a label.

"This food inspection decision is promulgated so that those interested in the importation of 'bitters' may understand how the Department is obliged to rule in such cases, the decision as to whether a product be a food or a drug depending not only upon what claims are made for it, but also upon the uses to which it is put. This same principle must guide the Department in its interpretation of the law governing simi-

lar products which have the dual function of serving as both foods and drugs.”⁶

§ 420. Blackberry Cordial.

A liquid labeled “Blackberry Cordial, artificially colored,” is mislabeled if it contains as much as 8 percent alcohol, which is not declared upon it.¹

§ 421. Brant’s Soothing Balm.

(On carton) “Brant’s Soothing Balm. Contains 98 percent alcohol. For all pain internal and external. 25 cents. For Colds, Coughs, Diphtheria, Sore Throat, Pain in the Stomach, Head, Back and Limbs. Also for Colic in Horses. See directions.” (In German) Cures colds, coughs, diphtheria, rheumatism, pains in the stomach, intestines, &c. (Directions in German on the inside) “No. 916. Guaranteed under the Food and Drugs Act, June 30, 1906. The J. W. Brant Co., Ltd., Albion, Mich. All the genuine are signed, J. W. Brant, Albion, Mich. [Entered according to Act of Congress in the year of our Lord 1873, by J. W. Brant of Hillsdale, Mich., in the Office of the Librarian of Congress, at Washington.] Good for Colic, Bowel Complaints, Weak Stomach, Painters’ Colic, Cholera, Cramps, Dysentery, Neuralgia, Tooth and Ear Ache, Scalds, Bruises and Sprains.” (On bottle) “Brant’s Soothing Balm! Contains 98 percent alcohol. Taken internally or applied externally, for all pain, giving instant relief. Rheumatism, Neuralgia, and all external pain, quickly relieved if apply flannel saturated with Balm, or bathe and rub well as case may require. To break a cold quickly, for Dyspepsia, Sour Stomach, Internal Pain, Diarrhoea, Fever and Ague, etc., take a teaspoonful of Balm in sweetened water, from 3 to 6 times a day; less quantity for children. Diphtheria or Canker, take internally—bathe and gargle throat at bedtime. See full directions with bottle.”¹

⁶ F. I. D. 85. So far as the representation concerning the curative powers of these bitters the Pure Food and Drugs Act does not cover them. See § 406.
¹ N. J. 612.

(Blown in bottle) "The J. W. Brant Co., Brant's Soothing Balm, Albion, Mich." Samples of this product were procured and analyzed by the Bureau of Chemistry, United States Department of Agriculture, and the product was found to be an alcoholic solution of camphor, oleo-resin of capsicum, a trace of sassafras oil and water, with the proportion of alcohol in the product incorrectly stated. It was adjudged that the product was mislabeled.¹

§ 422. Bromo Febrin.

A product containing the statement that "each Powder contains 4 grains of Acetanilid," when it contains nearly 6 grains, is mislabeled.¹

§ 423. Buchu Gin.

To label a liquid "Buchu Gin" when it contains 38.66 percent of alcohol and a mere negligible quantity of buchu, is to mislabel it.¹

§ 424. Cafe-Coca Compound.

A product labeled "Cafe-Coca Compound containing Caffeine Coca Extract and Fourteen Healthful Fruit Oils," is mislabeled if it contains cocaine.¹

§ 425. Calcium Acid Phosphate.

A substance labeled "C. A. P." to indicate that it is Calcium Acid Phosphate is mislabeled if it is not Calcium Acid Phosphate.¹

§ 426. Camphor.

A liquid labeled "Camphor" that does not come up to the standard prescribed by the United States Pharmacopoeia, is mislabeled.¹

¹ N. J. 777. The Pure Food and Drugs Act does not cover the representations concerning the curative powers of the medicine. See § 406.

¹ N. J. 182.

¹ N. J. 134; N. J. 160.

¹ N. J. 235.

¹ N. J. 656.

¹ N. J. 550.

§ 427. Cancer Cure.

Where an article was labeled "Cancer Cure," purporting to constitute a treatment for the cure of cancer, and it was not a cure, the Department of Agriculture held that it was mislabeled,¹ although one of the District Courts in a similar case held that a like product was not.² The Department made a similar ruling in an instance of "Cancerine."³ In another instance a product labeled "Cancerol, a compound of essential oils for the treatment of malignant diseases," and of a salve, "Healing salve, composed of a due mixture of vegetable and mineral oils, with certain drugs of highly healing qualities," and the bottle did not contain a compound of essential oils, but did contain 14 percent alcohol and a certain proportion of opium, of which fact there was no statement on the label, and the salve was not a compound of vegetable oil with highly healing qualities, there was a judgment of conviction on a plea of guilty.⁴ A drug product was labeled as follows: (a) "Mixer's Cancer and Scrofula Syrup;" (b) "No. 1 Wash;" (c) "No. 1 Alterative;" (d) "Cancer Reducer;" (e) "Cancer Paste;" (f) "Cancer Salve;" (g) "Cleanoine Soap Powder." With these drugs was a pamphlet called "The Truth," and in said pamphlet and on the labels of the packages above referred to were numerous statements as to the curative value of the treatment in question. Samples of this shipment were procured and analyzed by the Bureau of Chemistry, United States Department of Agriculture, and the above seven packages were found to contain respectively: (a) A syrup containing potassium iodide, a small amount of vegetable ingredient similar to sarsaparilla, methyl salicylate flavoring, and about 6 percent alcohol; (b) an ordinary solution of hydrogen peroxide; (c) a hydro-alcoholic solution containing a large amount of glycerine and small amount of vegetable matter similar to gentian; (d) a strongly alcoholic solution of camphoraceous oils combined with considerable glycerine; (e) an ointment paste made up with

¹ N. J. 507; N. J. 907.³ N. J. 427.² N. J. 266.⁴ N. J. 606.

vaseline, including a large amount of ground flaxseed and camphoraceous oils, and a substance resembling hyoscyamus or belladonna; (f) a salve composed of vaseline; (g) a powdered soap with borax and thymol. It was held that this product was mislabeled.⁵

§ 428. Cascara—Castor Oil.

A liquid labeled "Cascara, Wild Lemon, Castor Oil Pills, Compound," containing calcium sulphide, capsicum, atropin, and only a trace of castor oil, is mislabeled.¹

§ 429. Catarrh and Hay Fever Remedy.

A product labeled "Remedy for Hay Fever and Catarrh of the Nose," which contains 99.95 percent cocaine hydrochloride, is mislabeled if the words "cocaine hydrochloride" be not on the label.¹ A drug product was labeled as follows: "Stuart's Catarrh Tablets. Always look for the signature F. A. Stuart; none genuine without it; price 50 cents Constitute a new and effectual cure for nasal catarrh, catarrh of the throat, catarrh of the stomach, catarrh of the liver, intestinal catarrh, catarrh of the bladder, cold in the head and hay fever No. 10 Guaranteed under the Food and Drugs Act, June 30, 1906;" and accompanied by pamphlets containing the following statements: "Composed as they are of antiseptics there is no risk of taking too many We know that the regular daily use of these tablets will cure catarrh Owing to the large amount of antiseptic remedies contained in them, the tablets are unpleasant and nauseating to some persons, but these antiseptics are absolutely necessary to cure the disease and drive out the catarrh poison." Samples from the above shipment were procured and analyzed by the Bureau of Chemistry, United States De-

⁵ N. J. 797.

All these decisions in this section noted are overturned by the judgment of the Supreme Court so far as they relate to the curative pow-

er of the drugs or medicines. See § 406.

¹ N. J. 32.

¹ N. J. 323.

partment of Agriculture, and the product was found to consist of ash (consisting of tale and calcium carbonate, and trace of iron) 31.9 percent, sucrose (cane sugar) 59.1 percent, moisture 0.93 percent, the balance consisting of sanguinaria and a little starch. The alkaloid sanguinarin was detected. It was adjudged that the product was misbranded.²

§ 430. Celery Cola.

A liquid was labeled "Celery Cola." It contained caffeine, cocaine and cocaine derivatives, and this fact was not stated on the label. There was a judgment of conviction for mislabeling. The court charged the jury that as Celery Cola was intended for a beverage, and not a drug, then they must determine whether it was injurious to health, and that in determining that question they had a right to consider the injury from the probable frequent and repeated use of the article as a beverage, rather than its rare and occasional use as a drug.¹

§ 431. Cocaine.

A substance labeled "Cocaine" is mislabeled if it contain 80.34 percent acetanilid and 19.64 percent cocaine hydrochloride.¹

§ 432. Cocaine Hydrochloride.

If cocaine hydrochloride be used in a package as medicine, that fact must be stated on the label.¹

§ 433. Cod Liver Oil.

If the label on cod liver oil contains this false and misleading statement, "Contains Norwegian Cod Liver Oil, as represented by its active medicinal ingredients in combination with

² N. J. 718. Under the decision of the Supreme Court representations concerning the curative power of a drug or medicine are not covered by the statute. See § 406.

¹ United States v. Bradley, Fed.

N. J. 326. Celery Cola is a food. United States v. Mayfield, 177 Fed. 765.

¹ N. J. 646.

¹ N. J. 10; N. J. 646. See N. J.

735.

the Hypophosphites," and that "It enriches the blood," "successfully used in the treatment of Pulmonary Consumption, preventing rapid waste and maintaining the general health of the patient."¹

§ 434. Coke Extract.

A liquid was labeled "Coke Extract, 8 oz. F. E. Coca Leaves to each Gallon of this Extract." It contained cocaine, and it was held to be mislabeled.¹

§ 435. Cola Queen Syrup, "Red Seal."

A product was labeled "Cola Queen. Directions—Carbonate at 60 lbs. pressure, throwing one ounce to a half-pint bottle. Harmless color added." The product was found to be syrupy liquid consisting essentially of caffeine 0.09 percent, cocaine and cocaine derivatives, phosphoric acid, sugar, caramel, flavoring agents and water. As the product contained no substance derived from the cola nut or cola plant, as indicated on the label, it was held misbranded, and calculated to mislead the purchaser.¹ A similar result was arrived at where the product was labeled "Cola Syrup."²

§ 436. Cold and Grippe Tablets—Laxative.

A drug was labeled as follows: "Cold and Grippe Tablets. Laxative. Dose: One Tablet Three Times a Day. Cure a Cold in One Day. Waldron Drug Store, Denison, Texas. The only Cold and Grippe Tablets made. These Tablets will relieve Sick Headaches Immediately. They are Laxative. After Taking a few doses, the Bowels will move mildly, leaving the whole system in perfect order. Relieve Sick Stomach and Backache. Guaranteed Purely Vegetable." Samples from this shipment were procured and analyzed by the Bureau of

¹ N. J. 598.

Representations concerning the curative powers of the drug is not covered by the statute. See § 406.

¹ N. J. 236; N. J. 309.

¹ N. J. 785.

² N. J. 731.

Chemistry, United States Department of Agriculture, with the following results: 0.3000 gm substance gave 0.0621 gm quinine or 20.70 percent, 0.0805 gm acetanilide or 26.83 percent; 0.2948 gm substance gave 0.059 gm quinine or 20.31 percent, 0.0797 gm acetanilide or 27.05 percent. It was held that this product was mislabeled.¹

§ 437. Colocynth.

If the pulp and seeds of colocynth apple be used in the manufacture of colocynth, then it is a violation of the statute to label it "Colocynth," because it is below the standard required by the United States Pharmacopoeia.¹ A product was labeled "Strictly Pure Powdered Colocynth," when as a matter of fact it consisted of colocynth and the seeds of colocynth. The defendant pleaded guilty to the charge of selling a misbranded product.²

§ 438. Cough Cure—"Kickapoo Cough Cure."

A drug product was labeled as follows: "Kickapoo Cough Cure. Alcohol 18¾%. Kickapoo Cough Cure, for coughs, colds, hoarseness, sore throat, croup, bronchitis." On analysis it was found to be a hydro-alcoholic solution of sugar, glycerine, vegetable extractions, aromatic bodies, organic salts and undetermined matter. The drug was not a cough cure. It also bore this false statement: "This preparation contains medicinal virtues of herbs in a concentrated form, combined with some of the best demulcents and expectorants in use, forming in all a pleasant and agreeable syrup, possessing properties recognized by the medical profession as necessary to the proper treatment of diseases of the lungs." It was adjudged mislabeled.¹

¹ N. J. 769. The representations concerning the curative properties of the drug are not covered by the statute. See § 406.

¹ N. J. 390; N. J. 292; N. J. 183; N. J. 192.

² N. J. 1012.

¹ N. J. 828. See also N. J. 965; N. J. 898. The statute does not cover the representations concerning the curative powers of the drug. See § 406.

§ 438a. Cramp Drops.

A product was labeled in the Norwegian language as follows: "Stange's Genuine Antispasmodic or Cramp Drops; for spasms, cramps, vertigo and headache. Dose: 30 to 60 drops three to four times a day on sugar or in a little water; for children 15 to 20 drops. Prepared by E. J. Abel, Successor to C. Stange, Examined Norwegian Pharmacist, Chicago." Packed with the product was a circular, also in Norwegian, which contained among other statements the following: "Stange's Genuine Antispasmodic or Cramp Drops. Recommended as a sure remedy against spasms, cramps, vertigo, pressure on the heart, pain in the chest, and headache. . . ." Sample from this shipment was procured and analyzed by the Bureau of Chemistry, United States Department of Agriculture, and the product was found to be an alcoholic solution of ether, oil of peppermint, color and undetermined matter. A criminal information was filed in the District Court of the United States alleging that the product was misbranded because the labels purported that the article was a cure or remedy against spasms, cramps, vertigo, pressure on the heart, pain in the chest and headache, when in truth and in fact it was not a cure or remedy for said disorders, and because the product contained alcohol and ether, and no statement as to the presence of said ingredients appeared on the labels upon the product. The defendants entered a plea of guilty.¹

§ 439. Damiana.

A product was labeled as follows: "Compound Extract of Damiana." "Each fluid ounce represents Alcohol 50 percent, Coca 15 gr., Damiana 76 gr., Nux Vomica 4 gr., Phosphorus 35/1000 gr. Useful as an aphrodisiac and for the restoration of virility in debility of the reproductive organs of both sexes. Damiana is a non-irritating sexual tonic. Coca exalts the intellectual faculties." The product did not have enough

¹ N. J. 903. Under the decision of the United States Supreme Court the accused had not committed any crime, so far as the representations concerned the curative powers of the drug. See § 406.

damiana to justify the use of the name "Extract of Damiana;" and the statement that it was "useful as an aphrodisiac and for the restoration of virility in debility of the reproductive organs of both sexes" was false, it not containing the aphrodisiac qualities claimed for it. It was held that the product was mislabeled.¹ A label stating that the liquid in the bottle on which it is placed contains "Damiana" or is a "Damiana Nerve Tonic," when there is no damiana in the liquid, is such a one as the statute prohibits.²

§ 440. Dandruff Cure.

To label a product "A permanent cure for dandruff," and that it is "pure and harmless," when it is not a "cure" for dandruff and is not "pure and harmless," is to violate the statute.¹

§ 440a. Diphtheria Cure.

A drug was labeled "Humbug Oil relieves diphtheria of the most malignant type." An analysis showed it consisted of immiscible portions, one an oil, 40 percent by volume, half volatile (oil of turpentine), and half nonvolatile (apparently linseed oil); and the other percent by volume consisting of hydroalcoholic solution of ammonia water, ammonium salts and a volatile alkaloid, probably conin. It was charged that it was misbranded for the reason that these ingredients do not possess properties to relieve diphtheria of the most malignant type; and the defendant plead guilty to the charge.²

§ 441. Eyelin.

A quantity of a drug preparation contained in a circular

¹ N. J. 345.

² N. J. 501. The statute does not cover false representations concerning the curative properties of a drug or medicine. See § 406.

¹ N. J. 454; N. J. 434. Under the decision of the Supreme Court this decision is erroneous. See § 405.

² N. J. 988.

tin box, upon one side of which were printed the following words:

One Dollar Repairs and Rejuvenates
Trade Mark EYELIN Registered
The Eye and Sight
The EYELIN CO., Chicago, U. S. A."

and upon the other side of which were printed directions for the use of said drug, said box being surrounded by a circular entitled: "How to Use Eyelin and Your Eyes." This tin box and surrounding circular were placed in a blue paste-board box, upon the front of which were placed the following printed words:

"Reshapes and Rejuvenates,
Trade Mark EYELIN Registered,
The Eye and Sight."

This drug was misbranded in the following particulars: (a) The label printed upon one face of the tin box containing this drug contained this statement: "Repairs and Rejuvenates the Eye and Sight."

The substance consisted essentially of perfumed or flavored vaseline. The defendant plead guilty and was fined.¹

§ 442. Febrisol, Tilden's.

A drug product was labeled as follows: "Guaranteed under the Food and Drugs Act, June 30, 1906, Serial No. 2262. Tilden's Febrisol. Trade Mark. Analgesic Antalgic & Antipyretic. Alcohol 61 Per Cent. Phenacetine 16 Grs. Acetanilide 10 Grs. in Each Fluid Ounce. Prepared only by The Tilden Company, New Lebanon, N. Y. Branch: St. Louis, Mo." Samples of this shipment were procured and analyzed by the Bureau of Chemistry, United States Department of Agriculture, and the product was found to consist of alcohol, glycerine, acetanilide, acetphenetidin, caffeine, salol, and other

¹N. J. 181. Under the decision of the Supreme Court this case was wrongly decided. See § 405.

unidentified drugs, the amount of alcohol being only two-thirds of that declared and the ratio of acetphenetidin to acetanilide being, approximately, 11 to 17, instead of 16 to 10, as declared. It was held that the product was misbranded.¹

§ 443. Gin-Seng-Gin.

A drug was labeled as follows:

(Obverse)

"Gin-Seng-Gin Compound. Alcoholic strength thirty-seven and fifty one-hundredths percent vol. seventy-five deg. proof. With phosphate. 'The Gin with a push.' Guaranteed under the National Pure Food and Drugs Act, June 30, 1906. Gin-Seng-Gin Co., Cincinnati, O."

(Reverse)

"The Gin with a push." Gin-Seng-Gin. The best Gin for fizzes, rickies and cocktails. We guarantee this preparation to be as pure as skill and science can make it. Free from tannin and sugar, and recommend it for certain forms of kidney and bladder troubles. Sold only in glass. Refilling prohibited, subject to prosecution."

The substance was not a gin, and the amount of phosphate was only 0.05, not justifying the use of the words "With Phosphate." Devices simulating and resembling Chinese characters and writing were used on the bottles, and this tended to deceive and mislead the purchaser into the belief that the product was of foreign manufacture or of Chinese origin, when in fact it was a domestic product. It was held that the product was misbranded.¹

§ 444. Grippe Cure—Colds.

A statement that tablets are a sure cure for la grippe, colds, headaches, and all pains and fevers where a pleasant remedy is desired, which is false, subjects the medicine to condemnation.¹

¹ N. J. 780.

¹ N. J. 327.

¹ N. J. 707; N. J. 898; N. J.

965. These decisions are erroneous under a recent decision of the Supreme Court. See § 406.

§ 445. Hair Coloring.

On the carton of a bottle was the following:

"Greatest Discovery of an eminent French Chemist Specialist. A foremost member at the Laboratory of Scientific Researches. Approved by the faculty. The most marvelous scientific hair coloring produced. Superior to all instantaneous and progressive dyes. It will not fade nor turn green, being positively harmless, odorless and inoffensive. Not only harmless but beneficial, removing dandruff and prevents the hair from falling out. . . ."

and in that the bottles containing the said drug product bore the following label:

"(Patent applied for) Registered No. 7204.

"An instantaneous vegetable hair coloring. By one single application will color gray, faded and bleached hair any shade, from ash blonde to most beautiful black. Removes dandruff and prevents the hair from falling out. Harmless and durable. Directions inside. Sold by all druggists and hair dealers. Endorsed by U. S. Health Board, New York. This dye can not be washed off or bleached out. Mrs. H. Guilmar. None genuine without my signature."

This statement of facts was false, in that it indicated that the product was a vegetable substance which would color the hair, when there was no vegetable substance in it that would color the hair. So the statement that it would remove dandruff and prevent the hair falling out was false. It was held that the bottles were mislabeled.¹

§ 446. Hair Tonic.

A product was labeled "Lombardo's La Tosca Hair Tonic," and upon the label appeared the following; La Tosca Hair Tonic will eliminate any Scalp Disease, Dandruff, Itch, Headache and the falling of hair. It is advisable, while using La Tosca, to shampoo your scalp at least once a week. This contains pure Columbian spirit." These statements were false, and the article contained 98.5 percent of methyl alcohol, of which no statement was made on the label. To the charge of misbranding this product in this manner the manufac-

¹ N. J. 434. See N. J. 454. So the statute does not cover it, and far as the representations concern this decision is in that respect erroneous. See § 406.

turer pleaded "guilty."¹ A product was labeled as follows, and it was adjudged adulterated: (On bottle) "Mrs. Gervaise Graham's Cactico Hair Grower. Will produce hair on bald Heads. Stops falling of the hair, keeps the scalp healthy." (Blown in side of bottle) "Mrs. Graham's preparations are pure and harmless. Mrs. Gervaise Graham, Beauty Doctor, Chicago and San Francisco." (On carton) "Mrs. Gervaise Graham, Catico Hair Grower, 5 percent alcohol, and manufacturer of celebrated cosmetics, Chicago, Illinois. For sale by all leading druggists." Samples from this shipment were procured and analyzed by the Bureau of Chemistry, United States Department of Agriculture, and the product was found to contain alcohol 4.38 percent by weight and 5.58 percent by volume, borax 0.35 percent, glycerin 6.79 percent, water 88.48 percent, and capsicum present.²

§ 446a. Haarlem Oil Capsules.

A product was labeled "Gold Medal Genuine Tilly Haarlem Oil Capsules, for kidney, liver and bladder. . . . The oldest Tilly Haarlem Oil used for over 200 years." It contained alcoholic insoluble matter, nonvolatile material, sulphur, volatile oil, methyl salicylate, and oil of amber. Methyl salicylate is not a normal ingredient of Haarlem oil; and so it was adjudged that the product was misbranded.¹

§ 447. Headache Cure.

A drug labeled a "cure for sick or nervous headache, neuralgia and sleeplessness" is misleading when it is not a cure for headache or neuralgia or sleeplessness, it not being able to remove the cause of such indispositions.¹ To label a prod-

¹ N. J. 319.

² N. J. 715. Under a decision of the Supreme Court drugs can not be condemned as in violation of the statute because of representations thereto placed on the label. See § 406.

¹ N. J. 987.

¹ N. J. 709; N. J. 708; N. J. 707; N. J. 643; N. J. 633; N. J. 631; N. J. 630; N. J. 624; F. I. D. 233; N. J. 182; N. J. 568; N. J. 329; N. J. 986; N. J. 941; N. J. 931; N. J. 919; N. J. 908; N. J. 906; N. J. 965.

net "Cuforhedake Brane Fude" or "Cuforhedake Brain Food" when it is not a cure is to mislabel it.² A label on a product for curing headache which states that it does not contain any "dangerous drugs," when it in fact contains acetanilid, is falsely branded.³ A statement that red powder contains two grains of acetanilid when it contains three is a mislabeling of the article.⁴ A failure to state that the liquid contains acetanilid and alcohol is to mislabel it;⁵ and so to represent that the product contained pepsin when it does not, and that pepsin and soda combined with acetanilid and caffenin will ordinarily cure a headache, because it will not.⁶ An alleged headache cure was labeled as follows:

"Telephone Headache Tablets. Each envelope contains six Tablets. Guaranteed Absolutely Harmless. This is a reliable remedy for the cure of sick and nervous headache, toothache, neuralgia, rheumatic pains and any nervous irritations, giving almost immediate relief. They contain no opium, morphia, or any injurious medicine. Pleasant to take and perfectly harmless when used as directed. . . .

"None genuine unless signed Charles W. Horn, Pharmacist, Proprietor of the 'Telephone' Remedies, Slatington, Pa. Guaranteed under the Food and Drugs Act, June 30, 1906. Containing two hundred grains acetanilide per ounce, No. 1579. A very effectual remedy for headache or any nervous and rheumatic pain. Try it. By druggists and dealers everywhere or by mail on receipt of price."

These statements were false, to wit: "Each envelope contains six tablets. Guaranteed absolutely harmless." "They contain no opium, or morphia, or any injurious medicine. Pleasant to take and perfectly harmless when used as directed." Enclosed with each retail package was a circular which contained these statements: "They absolutely contain no opium, morphia, or any injurious drugs, but are in every respect the latest result of science." "This remedy is a combination of the best known medicines from the vegetable kingdom, each having a specific action of its own, and in their combined state, act as a most powerful specific against

² N. J. 25.

⁵ N. J. 208; N. J. 191; N. J.

³ N. J. 449; N. J. 418; N. J. 573. 260; N. J. 559.

⁴ N. J. 346; N. J. 569.

⁶ N. J. 465; N. J. 225; N. J. 258.

the disease of the nerve centers." It was held mislabeled.⁷ To say that each powder contains one-half ounce of acetanilid when it contains more is to mislabel it.⁸ A drug product was labeled "Burwell's Instantaneous Headache Cachets. These Cachets are composed of Caffein and Acetanilid and are warranted free from Antipyrine, Morphine, Chloral or Opium. They are speedy, certain and safe remedy for headaches of all origin, whether Sick, Bilious, Nervous or Hysterical." The product consisted of caffeine, acetanilid and sodium bicarbonate. They were not a speedy, safe and certain remedy for headaches of all origin; it produced no therapeutic value for headaches of any origin; and it was not safe because it contained a large amount of acetanilid, a dangerous drug. It was adjudged misbranded.⁹

§ 448. Hydrogen Peroxide.

To fail to state on the label of a bottle containing hydrogen peroxide that it contains acetanilid is to violate the statute.¹

§ 449. Injurious Drug.

A statement on a label that the bottle on which it is placed "contains no injurious drugs and is perfectly harmless" is false and misleading when it contains acetanilid and caffeine and is injurious to one's health who takes it.¹

§ 449a. Jamaica Ginger.

A product was labeled "Jamaica Ginger." It was a highly dilute solution of ginger extract not over half the standard of that article. It was adjudged misbranded.¹

⁷ N. J. 392.

⁸ N. J. 428.

⁹ N. J. 820.

So far as these several decisions are based upon that part of the label with reference to the curative power of the drug they are errone-

ous, under a decision of the Supreme Court. See § 406.

¹ N. J. 575; N. J. 216.

¹ N. J. 708; N. J. 631; N. J. 624.

These decisions are probably not affected by the recent Supreme Court decision. See § 406.

¹ N. J. 936.

§ 449b. Kamola.

A label on a drug stated that it was ground kamola. An analysis showed it to be a mixture of kamola and sand, the latter ingredient forming 40 percent of the product. To a charge of misbranding the defendant pleaded guilty.²

§ 450. Koca Nola—Kola-Ade—Kos-Kola.

A product was labeled "High Grade Koca Nola, Soda Water Flavor Guaranteed under the Food and Drugs Act, June 30, 1906." It contained cocaine. It was held that the product was mislabeled. The court said that it made no difference that the quantity was small; "any cocaine" in the liquid was sufficient to render the act of labeling one of mislabeling.¹ Kola-Ade containing cocaine and coca leaf alkaloïds must be so labeled;² and so Kos-Kola containing cocaine.³

§ 451. Kurakoff.

On a carton was the following: "Kurakoff, the Lung Healer, catarrh and asthma cure. A wonderful combination of Russian white pine, Mexican wild sage honey, with new gums and oils heretofore unused. A positive cure for consumption, bronchitis, hemorrhages, asthma, catarrh, hay fever, sore and weak lungs, coughs, colds and sore throat. A speedy and never failing remedy for croup, whooping cough and diphtheria. The druggist is authorized to refund the price where it does not relieve or cure when properly tried. For sale by all druggists. Price fifty cents. X X X C. A. Lewis, New York, Kurakoff. Trade Mark Registered;" (on bottle) "X X X The great pine remedy Kurakoff. Lung healer, catarrh, Hay Fever and asthma cure X X X. A specific for kidney diseases. Absolutely harmless. I hereby guarantee that the medicine manufactured, sold and distributed by me under the name and trademark 'Kurakoff' is not

² N. J. 1011.

² N. J. 310.

¹ N. J. 202. See also N. J. 909

³ N. J. 296.

for Kola Cordial.

adulterated or misbranded within the meaning of the Food and Drugs Act of June 30, 1906. C. A. Lewis, Somerville, Mass.;" (on circular packed with product) " . . . Is positive cure for that dreaded scourge diphtheria, and is a sure preventative. Never a case in families where it is used. . . . Can be given with perfect safety to infants and weakest patients. . . ." Samples from this shipment were procured and analyzed by the Bureau of Chemistry, United States Department of Agriculture, and the product was found to be a greenish-brown liquid containing 59.9 percent non-volatile material, including invert sugar 41.5 percent, salicylic acid, gummy material, and a product resembling extract of squill. The balance of the product consisted largely of water with small amounts of turpentine and oil of sassafras. As the claims of this product as a curative were false, it was adjudged misbranded.¹

§ 452. Laudanum.

A laudanum was labeled "Highest Quality and Strictly Pure," which was false. The label stated it contained 45.5 grains of opium to the ounce, when it contained only 37.7 grains. It was held misbranded.¹ If the label fails to state the quantity or proportion of alcohol, opium or morphine contained in it, it is mislabeled.² So if it does not come up to the standard of the United States Pharmacopoeia.³

§ 453. Lopez Specific Special Compound.

A product was labeled as follows: "Lopez Specific Special Compound—\$5.00. Guaranteed by Lopez Remedy Company, under Food and Drugs Act, June 30, 1906—Serial No. 7344, and the Kansas Food and Drug Act, February 14, 1907, Serial No. 100; Arkansas Food and Drug Act, May 28, 1907,

¹ N. J. 750. This decision can not now be sustained so far as it is based upon the false representations of the curative powers of the drug. See § 406.

¹ N. J. 226.

² N. J. 333.

³ N. J. 459.

Serial No. 31. . . . Lopez Remedy Co., Wichita, Kansas, U. S. A., Hot Springs, Arkansas, U. S. A.” Accompanying said bottle and packed therewith, was a pamphlet descriptive thereof. Samples from this shipment were procured and analyzed by the Bureau of Chemistry, United States Department of Agriculture, with the following results: Alcohol 27.40 percent, potassium iodide 3.85 percent, total mineral substances 6.02 percent, total extractive material 9.40 percent; giving reaction for a laxative drug such as podophyllum with odor, suggesting the presence of sarsaparilla, stillingia, eucalyptus, and taste indicative of the presence of a bitter tonic, like gentian. As the findings of the analyst and report made indicated that the product was misbranded within the meaning of the Food and Drugs Act of June 30, 1906, the Secretary of Agriculture certified the matter to the United States District Attorney who filed in information against the Lopez Remedy Company alleging substantially that the product so shipped was misbranded within the meaning of the Act in that: (1) The use of the word “Specific” upon the said label was unwarranted and misleading inasmuch as the article was not a specific; (2) the alcohol contained in said article was not declared in the manner prescribed by Regulation 17, Department of Agriculture; (3) the following statements which appear in the above mentioned pamphlet entitled “Plain Talk on Blood, Skin and Private Diseases;” “Lopez has no equal;” “Nothing but Lopez can and does work such wonders;” were false and misleading inasmuch as the remedy was not calculated to work wonders and was not an infallible cure for the diseases therein enumerated; (4) the statement in said pamphlet, to wit, “Lopez will effect a positive and permanent cure for rheumatism, in all of its many forms,” was false and misleading for the reason that the said remedy would not effect a permanent, positive cure for rheumatism in all of its forms; (5) the statement in said pamphlet, “The only guaranteed cure for . . . Consumption, Scrofula, Syphilis, Rheumatism, Stomach, Liver and Bladder affections, Gleet, Sexual Weakness, and Failing Memory,” was false, for the

reason that the said remedy is not the only guaranteed cure for said diseases, or any of them; (6) the statement in said pamphlet, that "Lopez is a . . . vegetable remedy and positively contains no . . . minerals" is misleading, inasmuch as said remedy does contain minerals, to wit, 6.02 percent mineral substance; (7) the said article also contained alcohol, 27.40 percent; potassium iodide, 3.85 percent; also mandrake (podophyllum), sarsaparilla, stillingia, eucalyptus, and gentian, and the label thereof failed to state correctly the proportion of alcohol in said article; (8) the aforesaid pamphlet accompanying said article contained the following statement: "We not only guarantee to permanently cure Scrofula, Syphilis, Running Sores, Tubercular Glands, Erysipelas, Catarrh, Rheumatism, Stomach, Liver and Bladder affections, Gleet, Sexual weakness, Failing Memory, Weak Eyes, General Decline and Blood Poison, in every form, but further agree . . .," which statement was false and misleading in that the said article would not permanently cure consumption, rheumatism, or diseases of the stomach, liver and bladder, in general, or any or all of said diseases, nor could it be relied upon to cure the other diseases specified in said statement; (9) accompanying said article so shipped was a printed circular or leaflet containing the following statement: "Only 3 to 6 \$5.00 16 Ounce Bottles of Lopez Specific is needed to cure Blood Poison (Syphilis), Scrofula (Running Sores), Malaria, Rheumatism, Paralysis, Early Consumption, Loss of Voice, Weak Eyes, Falling Hair, Sexual Weakness, General Decline, etc.," which statement was false and misleading, in that said article was not a cure for consumption, scrofula, syphilis and the other diseases specified therein, or any of them. Upon arraignment the defendant was adjudged not guilty, the court holding that no misrepresentation as to the curative or therapeutic qualities and properties of an article is a misbranding.¹

§ 454. Make-Man Tablets.

Tablets were labeled "Make-Man Tablets." "A brain and

¹ N. J. 816. But see now § 406.

nerve food; especially prepared for the treatment of dyspepsia, neuralgia, kidney and liver trouble, catarrh, consumption, locomotor ataxia, wasting diseases, nervous debility, female disorders and all kindred diseases resulting from worn out nervous system." "Distinctly a tonic to build up the system and contains no poison." "Make-Man Tablets make blood, . . . therefore any man that finds his health impaired, his vital force lacking as a result of overdoing, can replenish this lost power by timely use of Make-Man Tablets. . . . Sold under absolute guaranty to restore lost vitality. A valuable discovery and a favorite prescription of a recognized practitioner. Makes the nerve cells strong because of supplying them with the right food. . . . A healthy and natural food for the nerves rather than a temporary stimulant like most advertised so-called aphrodisiacs." The tablets contained arsenic and strychnine, and this was not stated on the tablets. The statements concerning its being a specific for certain disorders were greatly exaggerated and misleading. It was not adapted to or suitable for the purpose of making blood or for the purpose of replenishing lost power in man or for the purpose of restoring lost vitality, and was not suitable for stimulating the system in the manner accomplished with so-called aphrodisiacs." It was held that the article was mislabeled.¹

§ 455. Microbe Killer.

A substance labeled: "It is a positive and certain cure for all diseases and is guaranteed to be perfectly harmless; it will effect a cure in every instance if given a fair trial." "Cures by removing the cause—microbes." "Microbe Killer is perfectly harmless and can be taken in any quantity without danger." "Cures all diseases," which is false, is mislabeled.¹

¹ N. J. 201; N. J. 294; N. J. 891.

These decisions can not stand under the recent decision of the Supreme Court. See § 406.

¹ N. J. 623; N. J. 205; N. J. 907 (septicide). Under the recent decision of the Supreme Court these decisions can not stand. See § 406.

§ 456. Morphine—Opium.

“Many inquiries are received as to the method of stating the quantity or proportion of preparations (containing opium, morphine, etc.) used in the manufacture of other preparations. Of these the following are typical:

If the label on the bottle were to bear the words “Tincture of Opium,” I reason that this is a definite preparation, constituting a preparation of opium, and so definite as to its composition that to any intelligent person it expresses definitely all that it is desirable to express, the use of this title alone should be sufficient. I feel that as a preparation it is distinct from opium, and if this particular tincture is used in the manufacture of a preparation the mention of it alone should be sufficient.’

‘Where extract or tincture of *cannibis indica*, or extract of opium, is employed in making other drug products, would it not be complying with the law if the use of such articles be clearly indicated on the label as prescribed by the law, or is it necessary to give the actual amounts of the drugs themselves represented by these preparations?’

“Names of drug products bearing any of the names of the ingredients enumerated in the Act are construed as representing ‘preparations’ within the meaning of the Act; and if the same are clearly declared upon the label as required by Regulations 17 and 30, it will not be necessary to give the actual amount of the primary drugs used or represented by such article. It is desirable, however, that the word or words used in the law shall constitute the first part of the name of the product. For example: ‘Opium, Tincture of;’ ‘*Cannabis Indica*, Extract of,’ followed by the amount of tincture or extract used.”¹

§ 457. Mother’s Friend.

Bottles were labeled as follows:

“Mother’s Friend, for relief of the suffering incident to child-birth. The Bradfield Regulator Company, Sole Proprietors, Atlanta, Ga.”

and on one side of the carton containing said bottles:

“This is one of the greatest comforts of those expecting to become confined. It is a remedy upon which confidence can be placed, one that will

¹ F. I. D. 55.

assist in the safe and quick delivery, and that shortens the duration of labor. Such is Mother's Friend. Try it. It is a blessing to suffering women."

and on the other side of said carton:

"Mother's Friend has been used by hundreds of ladies throughout the country. It has been prescribed by many of our best physicians, and all pronounce it a success, giving relief from the dreadful pains and suffering of this trying time. Every woman expecting to become a mother should use it."

and in the literature accompanying said bottles:

"Morning sickness . . . to allay and cure this much dreaded affection we confidently advise the free application of Mother's Friend. To young mothers we offer you not the stupor caused by chloroform with risk of death to yourself or your dearly loved and longed for baby but an agent which will if used as directed invariably alleviate in a most magical way the pains, horrors and risks of labor and often entirely do away with them, it leaves her much less liable to flooding, convulsions and other alarming symptoms which so frequently follow the birth. Naturally will such be the result of the continued use of Mother's Friend because it indirectly assists all the organs to more naturally perform their functions. Owing to faulty physical development, to errors in dress, in food and hygienic surroundings every woman is forced to suffer in some way for a longer or shorter time during her term. To prevent, alleviate or cure all the suffering as well as to rob labor itself of its horror and pain is the mission of Mother's Friend; Mother's Friend when used a few months before confinement causes an unusually easy and quick delivery."

The claims for the properties and powers of this drug were false; and it was held that it was misbranded.¹

§ 458. Muco-Solvent.

A product was labeled as follows: "Muco-Solvent cures croup, whooping cough, diphtheria, all throat troubles and catarrhal disorders." This statement was unwarranted and untrue, and the court ordered the product destroyed.¹

¹ N. J. 203; N. J. 366; N. J. 636. Under the recent decision of the Supreme Court these decisions can not stand as the law. See § 406.

¹ N. J. 54. Under the recent decision of the Supreme Court this decision can not stand. See § 406.

§ 458a. Peppermint.

A product was labeled "peppermint." Dilute solutions containing little or no oil of peppermint had been mixed with it. It was held to be misbranded.¹

§ 459. Peroxide Cream.

A product was labeled as follows: (On bottle) "Brunner's Greaseless Peroxide Cream. An ideal bleach for the skin. . . . Peroxide Specialty Co., Cincinnati, O.;" (on carton) "Brunner's Greaseless Peroxide Cream. An ideal bleach for the skin. . . . Peroxide Specialty Co., sole distributors. Brunner's Peroxide Cream produces a rich, white skin and a complexion admirably fair. There is nothing more beneficial to the skin where blemishes or impurities exist than peroxide of hydrogen. Only the purest and best of this product is used in making Brunner's Peroxide Cream. . . . Guaranteed by the Peroxide Specialty Co., under the Food and Drugs Act, June 30, 1906. Serial No. 8085. Peroxide Specialty Co., Cincinnati, O." Samples from this shipment were procured and analyzed by the Bureau of Chemistry, United States Department of Agriculture, with the following results: Moisture and volatile matter at 100° C., 73.43 percent; ash 3.45 percent; borax, positive; glycerine, positive; spermaceti, positive; peroxides, negative. It was charged that the representations concerning this cream were false, and it was so adjudged, and the defendant held guilty.¹ But it is not necessary to place the name "peroxide" on a label, even though contained in the substance labeled.²

§ 459a. Pink Root.

A product was labeled "Pink Root," and it consisted largely of ruellia. Pink root is composed of the dry rhizome

¹ N. J. 936.

tive powers of the product, it can not stand. See § 406.

¹ N. J. 840; N. J. 965. So far as this decision is based upon the false representations of the cura-

² United States v. American Druggists' Syndicate, 186 Fed. 387.

and roots of the *Spigelia Marilandica*. It was held to be adulterated.¹

§ 460. Pine Oil Compound.

A liquid was labeled "Concentrated Oil of Pine Compound." An analysis showed that it consisted of a mixture of fixed oil, a resinous substance, and a small amount of volatile oil obtained by steam distillation resembling turpentine. It was held that the legend on the label was misleading.¹

§ 461. Pneumonia Cure.

A product was labeled "Gowan's Pneumonia Cure," and the label contained the statement: "It is entirely different from any other remedy, containing new principles never before applied; consequently, it can not be substituted." All the ingredients in its preparation were well and commonly known and were constantly applied, singly or in combination, in the very manner directed by the instructions accompanying the preparation, and were commonly used for the affections of the lungs, throat and other portions of the body similarly affected. It was held that the article was mislabeled.¹

§ 462. Quinine Whisky.

A product was labeled quinine-whisky, but it bore no statement of the alcoholic contents of the bottles which contained it. The label declared it contained pure quinine, each bottle having one and one-fourth grains per ounce; but it contained only one twenty-fourth of alkaloid material to the ounce, this material not being entirely quinine but mixed alkaloids and cinchona bark. It was also labeled "The greatest preventative and remedy for all malarial complaints ever offered." "Prevents and cures a cold." "The greatest tonic for convalescents from typhus and typhoid fever." "An in-

¹ N. J. 901.

¹ N. J. 30.

¹ N. J. 180. It may well be

doubted if this decision can stand under the recent decision of the Supreme Court. See § 406.

fallible cure for la grippe." The product was confiscated by the government.¹

§ 463. Radol.

A bottle was labeled as follows: "This bottle contains Radol (Registered Trade Mark), a radium impregnated fluid prepared according to the formula and under the supervision of Dr. Rupert Wells." "This fluid is not expected to retain its radio activity beyond forty days from the date of this label. For external use." The liquid in the bottle was not radium impregnated and it had no radio-activity beyond that of ordinary water. The name of Dr. Rupert Wells was a false and fictitious name; and the liquid was not prepared according to the formula of a Dr. Rupert Wells or under his supervision. The liquid contained 6.99 percent of alcohol, but the label contained no statement of the proportion of alcohol contained in the liquid or that the liquid contained any alcohol. The bottles with their contents were confiscated.¹

§ 464. Rock Candy Drips and Whisky.

A liquid was labeled "Rock Candy Drips and Whisky." It contained 27.2 percent by volume of alcohol. This was adjudged a violation of the statute, because the label failed to bear a statement of the quantity or proportion of alcohol in the bottles containing the liquid.¹

§ 464a. Rheumatic Cure.

A bottle was labeled "Rheumatic Cure Guaranteed Fitch Remedy. . . . Guaranteed to cure the most stubborn case of Sciatic or Muscular Rheumatism if directions are followed or money refunded. . . . This contains 45 percent Alcohol. . . . Prep. by the Fitch Remedy Co., Racine, Wis." An analysis showed that the product consisted essen-

¹ N. J. 112.

So far as this decision is founded upon the curative power of the whisky it can not stand under the

recent decision of the Supreme Court. See § 406.

¹ N. J. 184.

¹ N. J. 467.

tially of rhubarb and alcohol; alcohol in one bottle approximated 23.4 percent, in another bottle 27.7 percent per volume, non-volatile residue 21.5 percent. To a charge of misbranding based upon the ground that these ingredients do not possess properties to cure the most stubborn case of sciatic or muscular rheumatism, the defendant plead guilty.² A label on a package contained this statement: “. . . The presence of rheumatic germs is the cause of all Neuralgia and Rheumatic troubles. We are the first to discover . . . a radical and certain cure of this dreadful disease. The author of this pamphlet and originator of Cerrodaine . . . Having thus ascertained the cause, he sought for some remedial agent that would destroy the bacilli . . . he discovered a chemical combination which not only destroyed but also eliminated every germ and form of insect life both from the fluids and solids of the system, and restored the blood to . . . health. The discovery of the . . . cure of rheumatism.” Cerrodaine . . . a positive cure for rheumatism. An analysis showed it to contain sodium salicylate, potassium nitrate, and charcoal; chloroform extract, containing capsicum and an unidentified oil substance, 3.4 percent; ash (talc and carbonates and oxides of sodium and potassium), 32.1 percent. Misbranding was alleged for the reason that the product did not contain ingredients possessing the therapeutic properties adequate to effect a positive or sure cure for rheumatism or neuralgia, or to eradicate these diseases from the system; and to this charge the accused plead guilty.³

§ 465. Saltpetre.

A product was labeled “Pure Double Refined Saltpetre, granulated Nitrate-Potash.” An analysis showed the following results: Moisture 0.46 percent; chlorid (calculated as sodium chlorid) 7.28 percent; sulphates, trace. The pharmacopoeial standard for potassium nitrate (pure double-refined

² N. J. 1024.

recent decision of the United States

³ N. J. 1025; N. J. 907. These decisions can not stand under the

Supreme Court. See § 406.

saltpetre) is 99 percent pure. It was held that the product was mislabeled.¹

§ 466. Seidlitz Salts, German.

A product was labeled as follows: "Guarantee No. 3074. German Seidlitz Salts (Anhydrous Magnesium Sulphate) MgSO_4 , $6\text{H}_2\text{O}$. Promotes longevity, strengthens the nerves, cures headache after overindulgence. A pleasant aperient, laxative and purgative. Solvent of all albuminous and calcareous matter obstructing the circulation in the liver and kidneys; cleansing the stomach and bowels; purifies and decarbonizes the blood; cures chronic and sick headache. Genuine Seidlitz must not be confounded with Seidlitz powders. Its action is different. The salt is the same as the salts from Seidlitz Springs, Germany. It cures Hemorrhoids, constipation, bad breath, weak stomach, and soothes the mucous lining; removes all obstructions from the stomach and bowels; restores healthy action. The Seidlitz positively prevents appendicitis, varicocele, apoplexy, tendency to paralysis. The modern artificial mode of living demands aiding nature. Old age can be attained by taking small doses daily. The Seidlitz is invigorating. . . . The American Granule and Tablet Co., Manufacturing Pharmaceutical Chemists, Cincinnati, Ohio. . . ." Samples of this shipment were procured and analyzed by the Bureau of Chemistry, United States Department of Agriculture, and the product was found to consist of sulphur trioxide 41.49, magnesium oxide 21.18, water 37.22.

"In due course a criminal information was filed in the District Court of the United States for the Southern District of Ohio against the said American Granule and Tablet Company, charging the above shipment and alleging the product so shipped to be misbranded in that it was labeled as aforesaid in such manner as to deceive and mislead the purchaser, because said label and the statements upon said label were calculated and intended to and did create the impression

¹ N. J. 86.

and belief in the mind of the purchaser thereof that said article of drug was of German origin and manufacture and was a product derived from the Seidlitz Springs in Bohemia, Germany, when in truth and in fact said article was not of German origin or manufacture, nor was it a product derived from said Seidlitz Springs in Bohemia, Germany, but was of American origin and manufacture and was produced and manufactured in the city of Cincinnati, State of Ohio; and further alleging the product to be misbranded in that the statements 'Promotes longevity, Strengthens the nerves, Cures headache after over-indulgence;' 'Solvent of all Albuminous and calcareous matter obstructing the circulation in the liver and kidneys;' 'Purifies and decarbonizes the blood;' 'Cures chronic and sick headache;' 'It cures hemorrhoids, constipation, bad breath, weak stomach, and soothes the mucous lining; removes all obstructions from the stomach and bowels;' and 'The Seidlitz positively prevents appendicitis, varicocele, apoplexy, tendency to paralysis,' are untrue and false in that said statements convey the impression that said article possesses therapeutic properties capable of bringing about said beneficial physiological results when in truth and in fact the said article does not possess such therapeutic properties.

"On January 28, 1911, the cause came on for hearing and the defendants entered a plea of guilty to the above information, whereupon the court imposed a fine of \$25 and costs of prosecution.¹

§ 466a. Senna.

A product was labeled "Powd. Alex. Senna." An analysis showed that it contained sand and foreign vegetable tissue, substituted in part for senna leaves, and 30.81 percent of ash. To a charge of misbranding, the defendant pleaded guilty.²

¹ N. J. 843. So far as this decision is based upon the curative properties of the product it is er-

roneous under a recent decision of the Supreme Court. See § 406.

² N. J. 1009; N. J. 1010.

§ 467. Skin Food.

A product labeled "Epp-O-Tone, a skin food for beautifying the complexion," is misbranded if it consists essentially of magnesium, sulphate, commonly known as Epsom salts, colored with a pink dye, and which is not a skin food in any sense or beneficial to the skin.¹ A substance was labeled as follows:

"SARTOIN

(Trademark)

SKIN FOOD

Prepared only by

GLOBE PHARMACEUTICAL CO.

Dayton, Ohio, U. S. A.

FORMULA.

2 oz. Rose Water
4 oz. Sartoin
1 oz. Cologne Spirits
16 oz. Hot Water.

PROPERTIES.—Produces a soft, velvety tint on the roughest of skins and is remarkably effective in the treatment of pimples, blackheads, rash, blemishes and sunburn and chapped skin. Also highly beneficial for men's toilet after shaving; relieves all soreness and smarting.

SEE CIRCULAR INSIDE."

The circular to which attention is drawn stated the directions for using and recited the virtues of the preparation in part as follows:

"Is probably the most effective remedy known to science for sunburn, rashes, and all skin blemishes, as well as creating the normal growth of

¹ N. J. 433.

all parts not fully developed or shrunken. It is absolutely harmless to the most delicate skin, and if persistently used will benefit the worst complexion."

On analysis it was found that it consisted essentially of commercial magnesium sulphate (Epsom salts) colored with pink eye. The statement that this "skin food" would produce a "soft, velvety tint on the roughest of skins," and was "remarkably effective in the treatment of pimples, blackheads, rash, blemishes and sunburn, and chapped skin" were false and deceptive, because there is no such thing as "skin food" separate and apart from a food that nourishes all parts of the body. Epsom salts is simply a purgative; and when applied externally, as directed by the circular accompanying the bottle, could have no beneficial effect whatever. The whole product was confiscated.² In the case of Madam Yale's productions, they were confiscated.³

§ 467a. Sodid Alumnic Sulphate.

A product was labeled "Sodid Alumnic Sulphate." It contained 60 milligrams of metallic arsenic per kilo. It was adjudged to be misbranded.¹

§ 468. Soemnoform.

A product was labeled as follows: "Soemnoform. This mixture contains chloride of ethyl 60 percent, chloride of methyl 35 percent, bromide of ethyl 5 percent. Guaranteed under the Food and Drugs Act of June 30, 1906. Serial No. 5700. . . ." The composition did not contain "bromide of ethyl 5 percent," nor, in fact, any bromide of ethyl, whereby its professed strength fell below the professed standard of quality under which it was sold. It was held that there was a violation of the statute.¹

² N. J. 16. See Peroxide of Cream. N. J. 840.

³ N. J. 82.

None of these decisions can stand under a decision of the Supreme

Court rendered since they were made. See § 406.

¹ N. J. 1000.

¹ N. J. 571.

§ 469. Soothing Syrup.

To say of a child's soothing syrup that it "contains no morphine" than a certain amount when it does; and that it contains 4 percent of alcohol in each ounce, when it contains less, is to mislabel it.¹ So if it contains alcohol, and no mention is made of the fact, it is misbranded.²

§ 470. Sporty Days Invigorator.

A substance was labeled "Sporty Days Invigorator," but nothing upon the label showed that it contained alcohol, which it did. It was held that it was mislabeled.¹

§ 471. Sulphur Liquid—Germicide.

A liquid was labeled as follows:

"Hancock's Liquid Sulphur,
Hancock Liquid Sulphur Company, Baltimore, Md."

On the label of the carton containing the preparation there was printed among other things:

NATURE'S GREATEST GERMICIDE.

Permanently cures the most stubborn cases of Blood and Skin Disorder. An absolute disinfectant. Purifies the Blood by absorption, and removes all unhealthy secretions from the body. Renders the skin soft and white. Quickly relieves the irritation caused by semi-poisonous insects.

**A PERFECT SULPHUR SPRING
IN THE RETIREMENT OF YOUR HOME.**

The great cure for Eczema, Acne, Itch, Herpes, Ringworm, Pimples, Prickly Heat, Diphtheria, Catarrh, Canker, Sore Mouth and Throat, Granulated Eyelids, Ulcerated Conditions, Cuts, Burns and Scalds. All diseases of the Scalp."

One of the samples was subjected to analysis in the Bureau of Chemistry of the Department of Agriculture and the result obtained showed that it consisted of an aqueous solution of commercial calcium sulphide.

¹ N. J. 401; N. J. 777.

¹ N. J. 426.

² N. J. 832.

The statements appearing on the label of the product, representing that it was a preparation containing some unknown peculiar liquid sulphur; was "Nature's Greatest Germicide;" "A Perfect Sulphur Spring in the Retirement of Your Home;" "The Great Cure for . . . Diphtheria . . . ," etc., were false, misleading, and deceptive in the following particulars: The product was not a natural germicide because it was an artificial product, and furthermore could not even be classed among the "Greatest Germicides." It was not an "Absolute Disinfectant." It was not a "Perfect Sulphur Spring in the Retirement of Your Home," and it was not "The Great Cure for . . . Diphtheria . . ." This was held to be a violation of the statute.¹

§ 472. Teething Syrup.

A liquid was labeled as follows:

"Dr. Fahrney's Teething Syrup. Each ounce contains alcohol nine percent, morphine one and seven-tenths gr., chloroform two and three-tenths M. Drs. D. Fahrney and Son, Hagerstown, Md. Teething Syrup was originated and is made only by us. It contains seven articles besides those given below, and is the best remedy for teething, cholera infantum, indigestion, irregular bowels, sleeplessness, diarrhea, dysentery, etc. Guaranteed under Food and Drugs Act, June 30, 1906, Serial No. 971."

The following statements appeared in the label on the carton containing the bottle:

"A sure remedy for all ailments incident to babes from one day old to two or three years. Especially such troubles as wind colic, griping in bowels, diarrhea, difficult teething, disordered stomach, nervous peevishness, restlessness, lack of sleep, and general liver and kidney troubles, and if used in time will prevent cholera infantum. Contains nothing injurious to the youngest babe, and if given in proper doses will always relieve.

"Mothers need not fear giving this medicine to the youngest babe, as no bad results come from the continued use of it. Many children have taken two or three dozen bottles and today are hale and hearty."

The liquid contained alcohol 8.84 percent by volume, chloroform 0.408 minim per fluid ounce, morphine 0.126 grain

¹ N. J. 29. This decision can not stand under the recent decision of the Supreme Court. See § 406.

per fluid ounce. These facts showed that the statements: "Is the best remedy for teething," "A sure remedy for all ailments incident to babes from one day old to two or three years," "Contains nothing injurious to the youngest babe," and "No bad results from the continued use of it," were false, deceptive and misleading, as it was not the best remedy for teething, was not a sure remedy for all ailments incident to babies, contained injurious ingredients, viz., alcohol, chloroform, and morphine, and because bad results do follow from the continued use of it. It was held to violate the statute.¹

A product had on its label the statement that it "aids digestion, heals eruptions and sores, will stop and prevent the tendency to colic," and that "Teethina has saved the lives of thousands of children in the Doctor's [Moffett's] native State where physicians prescribe it and all mothers give it," and that "Teethina's speedy removal of sores and eruptions upon the skin have been remarkable." The label further represented that there is "nothing like it to remove and prevent the accumulation of worms in children;" that it is "an effectual remedy for cholera infantum, diarrhea, cholera morbus, colic, thrush, hives, eruptions and sores on the skin;" and that it "strengthens the child and makes teething easy." An analysis showed it to be a powder consisting essentially of opium, calomel, calcium carbonate and powdered cinnamon. It was charged that there was a misbranding regarding the ingredients and substances therein which statements were false and misleading and calculated to deceive the purchaser by reason of the facts that the product did not possess power to aid digestion, nor sufficient medicinal value to heal eruptions and sores; nor the power to prevent the tendency to colic; nor could it speedily remove sores and eruptions upon the skin; nor was the statement that the product had saved the lives of thousands of children true; nor was the article an efficient remedy to re-

¹ N. J. 144; N. J. 610. So far as these decisions are based upon the false representations concerning the curative properties of the drugs they can not stand. See § 406.

move and prevent the accumulation of worms in children; nor an effectual remedy for cholera infantum, diarrhea, dysentery, cholera morbus, colic, thrush, hives, eruptions and sores on the skin; nor did it possess such powers and properties as will strengthen the child and make teething easy. To this charge the defendant pleaded guilty.²

§ 472a. Tobacco Specific.

A product was labeled "Tobacco Specific. Cures Smoking, Chewing, Cigarette and Sniff Dipping." "Contains with other ingredients [not specified] Coca leaves grains 1-A, Derivative of Cocaine grs. 1-200 or 1-40th grain to the ounce." It contained cocaine and cocaine derivatives, strychnine, cinchona alkaloids, material amounting to 0.31 percent, with a small amount of ginger present; the remainder consisting of sugar, starch and excipient material, the preparation being flavored with methyl salicylate. It was adjudged improperly branded.¹

§ 473. Tonic.

Three bottles of a certain drug were labeled as follows:
On the front thereof—

"Sure Thing Tonic. The Wonder Stimulant. Restores Nerve Energy. Renews Vital Force. Alcoholic Strength Fifty Proof. Invigorator and Exhilarant. Guaranteed to conform with the National Pure Food Laws. Guaranty Serial No. 12141. Furst Bros., Cincinnati, Ohio."

And on the back thereof—

"REMARKS. 'Sure Thing Tonic' is distilled by Modern Methods evolved from half a century of practical experience. It is made so carefully that every bottle is put up as if it were an individual prescription. Our Laboratory is open for inspection to any Physician, Druggist or Pharmacist. 'Sure Thing Tonic' is an exhilarant. It relieves depression, stimulates the entire system, and will assist Nature to renew Vital Force and Nerve Energy. You can not afford to be without it. 'Sure Thing Tonic' should be taken by every person, male or female, whether in need or not of a Tonic

²N. J. 1019. See note to the previous citation in this section.

¹N. J. 930.

of its kind. 'An Ounce of Prevention is worth a Pound of Cure.' DIRECTIONS: Take a wine glass full three times a day, positively before retiring. You can double the dose if you so desire. If your dealer does not handle it, write to us.

In an information to secure the conviction of the vendor it was alleged that the label was false in this: First, that the article contained the following ingredients: Alcohol, sucrose and water, flavored with juniper, none of which ingredients justified the use on the label of these statements: "Sure Thing Tonic. Wonderful Stimulant. Restores Nerve Energy. Renews Vital Force. Relieves Depression, Stimulates the Entire System." Second, that the statement on the label that "Sure Thing Tonic, distilled by modern methods evolved from a half century of practical experience" was false and misleading because the drug was not a distilled product. Third, that the bottle containing the drug failed to bear upon the label a statement of the quantity or proportion of alcohol contained in the article. There was a judgment of conviction.¹

§ 474. Tragacanth Gum.

A substance was labeled "Powdered Gum Tragacanth." It did not come up to the test laid down in the United States Pharmacopoeia or National Formulary official at the time of the investigation. It was not powdered gum tragacanth but powdered Indian gum. It was held misbranded.¹

§ 475. Turpentine.

"The department has received a number of letters with reference to the proper labeling of the product generally known as "wood turpentine," etc., obtained by steam distilling or destructively distilling woods. Food Inspection Decision 58 recognizes that—

¹ N. J. 261; N. J. 982.

these decisions are
of false representa-
curative properties

of the drug, they can not stand under a recent decision of the Supreme Court. See § 408.

¹ N. J. 572; N. J. 998.

"Products used in the arts and for technical purposes are not subject to the Food and Drugs Act . . . when plainly marked so as to indicate that they are not to be employed for food or medicinal purposes.

"It is held, therefore, that when wood turpentine is labeled 'Not for Medicinal Use,' etc., it is not subject to the Food and Drugs Act. When not so labeled it is in violation of section 7 of the Food and Drugs Act unless labeled 'wood' or 'stump' turpentine. Articles labeled 'turpentine,' 'spirits of turpentine,' or 'gum turpentine,' etc., must comply with pharmacopoeial requirements; that is, they must be light oils of certain properties made by distilling the oleoresin of various species of Pinus. The word 'wood' or 'stump' should be in the same type and on the same background as the word 'turpentine,' thus being given equal prominence."¹ Mineral oil used in turpentine is an adulterant.²

A liquid was labeled "Spirits of Turpentine." It contained 35 percent of mineral oil. "Spirits of turpentine" in common parlance means and is identical with "oil of turpentine." It was held that the liquid was misbranded.³ To sell turpentine which is below the standard prescribed by the United States Pharmacopoeia or National Formulary is to violate the statute.⁴

§ 476. Vermouth.

A bottle of vermouth, labeled as such but containing 16 percent of alcohol is mislabeled unless it contains a statement of the amount of alcohol it contains. A statement on the label that it "would strengthen the mind," "increase the organic energy," and "was a safe preventive of fever and cholera" is false and misleading, and a violation of the statute.¹

¹ F. I. D. 103.

² N. J. 539; N. J. 337 (four and eight-tenths percent); N. J. 248; N. J. 220.

³ N. J. 220; N. J. 792 (fourteen percent).

⁴ N. J. 248; N. J. 337; N. J. 539; N. J. 712; N. J. 929.

¹ N. J. 461.

So far as this decision is based upon the false representations as to the curative qualities of the drug, it can not stand. See § 406.

§ 477. Wine of Coca.

A product was labeled as follows:

"LAMBERT'S WINE OF COCA WITH PEPTONATE IRON AND
EXTRACT OF COD LIVER OIL.

"Contains twenty-two percent Alcohol. A refined preparation, acting as a pronounced tonic and general Nerve builder. The Cod Liver Oil in this preparation is represented by the extractive principles, containing as it does the Morrhaine, Butylamine, Iodine, Bromine and Phosphorus.

"We fully warrant this product to be free from any opiate such as Morphine, Codeine or Opium.

"Guaranteed under the Pure Food and Drugs Act of June 30, 1906. Serial Number 1998."

It contained cocaine, but no iodine nor bromine. It was held mislabeled.¹

§ 477a. Wintergreen Extract.

A product was labeled "Winter Extract." It contained a dilute solution containing no oil of wintergreen. It was held to be misbranded.¹

§ 478. Wiseola.

A soft drink called "Wiseola" containing cocaine must be labeled so as to show it contained cocaine.¹

§ 479. Witch Hazel.

A liquid was labeled "Distilled Extract of Witch Hazel (Hamamelis)." "For bleeding piles, blind piles, toothache, earache, sore throat, sore eyes, sore navels, bleeding lungs, insect stings, neuralgia, rheumatism, burns, scalds, bruises, kidney disease, sprains, wounds, ulcers, lame back, frozen limbs, sore feet and corns." It contained 14.15 percent alcohol by volume. It was not valuable in the treatment of piles, rheumatism, quinsy, internal bleeding or hemorrhage, as claimed by the labels. It was held misbranded.¹

¹ N. J. 204.

¹ N. J. 936.

¹ N. J. 594.

¹ N. J. 609; N. J. 357.

These decisions can not stand under a recent decision of the Supreme Court. See § 406.

ART. V.—WEIGHTS AND MEASURES.

SEC.

480. Misstatement concerning.

481. Statement of weights or
measure.

SEC.

482. Method of stating quantity or
proportion.

§ 480. Misstatement Concerning.

The statute provides that if food or a drug is "in package form, and the contents are stated in terms of weight or measure, they are not plainly and correctly stated on the outside of the package," they shall be deemed misbranded.¹ This does not require the weight or measure to be stated on the package, but if stated it must be stated correctly, and Regulation 29 so states;² but "if any such statement is printed, it shall be a plain and correct statement of the average net weight or volume, either on or immediately above or below the principal label, and of the size of letters specified in Regulation 17."³ A reasonable variation from the stated weight for individual packages is permissible, provided the variation is as often above as below the weight or volume stated. This variation shall be determined by the inspector from the changes in the humidity of the atmosphere, from the exposure of the package to evaporation or to absorption of water, and the reasonable variations which attend the filling and weighing or measuring of a package."⁴ It will thus be seen that if a crate or box contains a number of cans of food, and the average weight of the cans is equal to that stated on the label on each can, there is a compliance with this regulation; but if the average is below, there is not, although some of them may be above the weight stated on the label. The method of stating quantity or propor-

¹ Section 8.² "A statement of the weight or measure of the food contained in a package is not required."³ "The size of the type used to declare the information required by the Act shall not be smaller than

eight-point (brevier) capitals; provided, that in case the size of the package will not permit the use of eight-point type, the size of the type may be reduced proportionately." Regulation 17.

⁴ Regulation 29.

tion is thus described: "In the case of alcohol the expression 'quantity' or 'proportion' shall mean the average percentage by volume in the finished product. In the case of the other ingredients required to be named upon the label, the expression 'quantity' or 'proportion' shall mean grains or minims per ounce or fluid ounce, and also, if desired, the metric equivalents therefor, or milligrams per gram or per cubic centimeter, or grams or cubic centimeters per kilogram or per liter; provided that these articles shall not be deemed misbranded if the maximum quantity or proportion be stated as required in Regulation 28."⁵

Cheese short one-quarter of a pound in 23 pounds are subject to condemnation.⁶ Such cheese when thus branded are misbranded. So where one pound less.⁷ Cans of apples labeled as "3 lb." cans when they weigh only two pounds are mislabeled.⁸ Cans of apricots marked $2\frac{1}{2}$ pounds are misbranded when they each weigh $2\frac{1}{8}$ pounds;⁹ so if they fall 2 ounces short out of 40 ounces;¹⁰ or 2 ounces out of 16;¹¹ or 10 ounces out of 2 pounds;¹² or 3 ounces out of a pound;¹³ or 1.1 ounces out of a pound;¹⁴ or 7 ounces out of 2 pounds;¹⁵ or 2 ounces out of one pound;¹⁶ or 8 ounces out of 3 pounds.¹⁷ If a crate of canned corn is labeled "2 doz. 2 lbs.," and the average of the cans is less than 2 pounds, then the entire crate of cans is subject to confiscation.¹⁸ In a case of 200

⁵ Regulation 30. The clause referred to in Regulation 28 is as follows: "A statement of the maximum quantity or proportion of any such substances present will meet the requirements, provided the maximum stated does not vary materially from the average quantity or proportion. In case the actual quantity or proportion is stated it shall be the average quantity or proportion with the variations noted in Regulation 29."

⁶ N. J. 705; N. J. 704.

⁷ N. J. 651.

⁸ N. J. 64.

⁹ N. J. 186; N. J. 92.

¹⁰ N. J. 330.

¹¹ N. J. 589.

¹² N. J. 93.

¹³ N. J. 364; N. J. 363.

¹⁴ N. J. 155.

¹⁵ N. J. 39.

¹⁶ N. J. 84.

¹⁷ N. J. 85.

¹⁸ N. J. 52; N. J. 53; N. J. 26; N. J. 27; N. J. 442; N. J. 488; N. J. 137; N. J. 138; N. J. 178; N. J. 39; N. J. 564; N. J. 511; N. J. 440; N. J. 422; N. J. 410; N. J. 342; N. J. 126; N. J. 63; N. J. 39; N. J. 356; N. J. 393; N. J. 416;

cheese the boxes containing the same were labeled as to the respective weights of the cheeses therein by pencil figures indicating the weights at which each cheese, respectively, was sold, which pencil figures incorrectly stated the weight and measure of the contents of said boxes, the weights stated on 18 of said boxes being as follows: 22, 22, 20, 20, 15, 21, 30, 31, 31, 23, 23, 19, 24, 22, 21, 29, 32, 29, which figures were so placed on the said boxes for the purpose of indicating the number of pounds contained in said boxes, respectively, the actual weight of the cheese contained in each of the said 18 boxes being, respectively, as follows: 21, 20.5, 18.75, 19, 14.25, 20.5, 30, 29.5, 21.5, 21, 17.75, 22.5, 20.75, 29.5, 27.5, 30.5, and 27.75; that the remaining 182 boxes bore like pencil figures indicating the weights of the contents of said boxes, respectively, which weights as to each of said boxes were incorrectly and falsely stated, the average weight of the cheeses being indicated by such marks as being 1.25 pounds greater than it actually was. It was held that these boxes were misbranded or mislabeled.¹⁹ Where a car load was made up of 700 sacks of meal, and the sacks did not contain the amount in weight indicated on them, the car load was condemned.²⁰ A 2 ounce phial 3.1 grains short is mislabeled.²¹ Flour sacks averaging 24 pounds each can not be labeled " $\frac{1}{8}$ barrel."²² A statement on a cheese box that it contains 45 pounds of cheese when it contains only 43 pounds is misbranding;²³ so marking 50 boxes of cheese so as to indicate their aggregate weight as 1,153 pounds, when the total was actually 1,113 pounds 11 ounces, and no single box of the weight marked thereon, is a misbranding.²⁴ A bottle

N. J. 500; N. J. 352; N. J. 196; N. J. 223; N. J. 234; N. J. 541; N. J. 43; N. J. 165; N. J. 70; N. J. 542; N. J. 321; N. J. 516; N. J. 436; N. J. 456; N. J. 212; N. J. 222; N. J. 553; N. J. 302; N. J. 518; N. J. 455; N. J. 311.

¹⁹ N. J. 556; N. J. 546.

²⁰ N. J. 358.

²¹ N. J. 14.

²² N. J. 113. To be eight and

eight-tenths percent short in volume is a violation of the statute. N. J. 751. So three and twenty-three one-hundredths percent short. N. J. 914.

²³ N. J. 1002.

²⁴ N. J. 995. So one pound, seven ounces out of forty-nine pounds is a violation of the statute. N. J. 905.

labeled one pint which falls short 25.6 percent, and another 28.1, is misbranded.²⁵

§ 481. Statement of Weight or Measure.

“(a) A statement of the weight or measure of the food contained in a package is not required. If such statement is printed, it shall be a plain and correct statement of the average net weight or volume, either on or immediately above or below the principal label, and of the size of letters specified in Regulation 17.

“(b) A reasonable variation from the stated weight for individual packages is permissible, provided this variation is as often above as below the weight or volume stated. This variation shall be determined by the inspector from the changes in the humidity of the atmosphere, from the exposure of the package to evaporation or to absorption of water, and the reasonable variations which attend the filling and weighing or measuring of a package.”¹

§ 482. Method of Stating Quantity or Proportion.

“In the case of alcohol the expression ‘quantity’ or ‘proportion’ shall mean the average percentage by volume in the finished product. In the case of the other ingredients required to be named upon the label, the expression ‘quantity’ or ‘proportion’ shall mean grains or minims per ounce or fluid ounce, and also, if desired, the metric equivalents therefor, or milligrams per gram or per cubic centimeter, or grams or cubic centimeters per kilogram or per liter; provided that these articles shall not be deemed misbranded if the maximum of quantity or proportion be stated, as required in Regulation 28 (d).”¹

²⁵ N. J. 1026.

¹ Regulation 29. The labels on forty-seven cans of condensed milk stated that the milk in each can contained sixteen ounces, net weight. The net weight of the cans ranged from fourteen and eighty-seven ounces to fifteen and eighty-one

ounces. The average shortage being two and ninety-five percent. To the charge of misbranding the defendant pleaded guilty. N. J. 1028.

Manufacturers of condensed milk often label a can “Net weight approximately sixteen ounces.”

¹ Regulation 30.

CHAPTER VIII.

THE GUARANTY.

SEC.

483. Statute.

484. Filing guaranty—Form.

485. Form of guaranty—Regulation.

486. Serial number guaranty.

487. Use of guarantes and serial numbers.

488. Effect of guaranty.

489. Statute construed—When reseller not liable.

490. Manufacturer selling goods

SEC.

within state to be shipped out of it, liability.

491. Abuse of guaranty for advertising.

492. Applies only to unbroken packages.

493. Retailer knowing that guaranty is false.

494. Issue of a guaranty based upon a former guaranty—opinion of Attorney General.

495. Guaranty on imported goods.

§ 483. Statute.

The statute provides as follows on the subject of guaranty: "No dealer shall be prosecuted under the provisions of this Act when he can establish a guaranty signed by the wholesaler, jobber, manufacturer, or other party residing in the United States, from whom he purchases such articles, to the effect that the same is not adulterated or misbranded within the meaning of this Act, designating it. Said guaranty, to afford protection, shall contain the name and address of the party or parties making the sale of such articles to such dealer, and in such case said party or parties shall be amenable to the prosecutions, fines, and other penalties which would attach, in due course, to the dealer under the provisions of this Act."¹

¹ Section 9.

This section is not unconstitutional as applied to a wholesaler who sells adulterated or misbranded goods within the state to a dealer under a guaranty of con-

formity to the pure food law, with knowledge that such guaranty was exacted to further the sale of the goods in interstate commerce; they having been actually shipped out of the state by the dealers relying on

§ 484. Filing Guaranty—Form.

"In order that both the department and the manufacturer may be protected against fraud it is requested that all guaranties of a general character be filed with the Secretary of Agriculture in harmony with Regulation 9, Rules and Regulations for the Enforcement of the Food and Drugs Act, June 30, 1906, be acknowledged before a notary or other official authorized to affix a seal. Attention is called to the fact that when a general guaranty has been thus filed every package of articles of food and drugs put up under the guaranty should bear the legend, 'Guaranteed under the Food and Drugs Act, June 30, 1906,' and also the serial number assigned thereto, if the dealer is to receive the protection contemplated by the guaranty. No other word should go upon this legend or accompany it in any way. Particular attention is called to the fact that nothing should be placed upon the label, or in any printed matter accompanying it, indicating that the guaranty is made by the Department of Agriculture. The appearance of the serial number with the phrase above mentioned upon a label does not exempt it from inspection nor its guarantor from prosecution in case the article in question be found in any way to violate the Food and Drugs Act of June 30, 1906."

§ 485. Form of Guaranty—Regulation.

"(a) No dealer in food or drug products will be liable to prosecution if he can establish that the goods were sold under a guaranty by the wholesaler, manufacturer, jobber, dealer, or other party residing in the United States from whom purchased.

"(b) A general guaranty may be filed with the Secretary the guaranty. *United States v. Charles L. Heinle Specialty Co.*, 175 Fed. 299. See also *United States v. Mayfield*, 177 Fed. 765.

Officers of a corporation are liable for the acts of the manager if they employ him to operate their

plant and to sell its product without restriction, when they intend or know he intends to aid in violating the statute. *United States v. Mayfield*, 177 Fed. 765.

¹ F. I. D. 40.

of Agriculture by the manufacturer or dealer and be given a serial number, which number shall appear on each and every package of goods sold under such guaranty with the words 'Guaranteed by [insert name of guarantor] under the Food and Drugs Act, June 30, 1906.'

"(c) The following form of guaranty is suggested:

I (we) the undersigned do hereby guarantee that the articles of foods or drugs manufactured, packed, distributed, or sold by me (us) [specifying the same as fully as possible] are not adulterated or misbranded within the meaning of the Food and Drugs Act, June 30, 1906.

(Signed in ink.)

[Name and place of business of wholesaler, dealer, manufacturer, jobber or other party.]

"(d) If the guaranty be not filed with the Secretary of Agriculture as above, it should identify and be attached to the bill of sale, invoice, bill of lading, or other schedule giving the names and quantities of the articles sold."¹ It will thus be seen that there are two forms of guaranty: 1. A general guaranty filed with the Secretary of Agriculture by the manufacturer or dealer, covering all products manufactured or sold by him (the guarantor), or all goods bearing certain specified names or trademarks made or sold by him. 2. A particular guaranty covering only a particular sale or shipment of products. In the latter case it must identify and be attached to the bill of sale, invoice, bill of lading, or other schedule giving the names and quantities of the articles sold or shipped. When the guaranty is filed with the Secretary of Agriculture it must be signed by the guarantor and its execution acknowledged before a notary public. If it be executed by a corporation or a partnership it must be made clear that the person executing it had authority to do so. When it is assigned the Secretary of Agriculture allots to the guarantor a serial number which he is to use on the products he manufactures or sells. No fees are charged for filing the guaranty and assigning a number. The guaranty should be drawn to cover precisely what it is intended

¹ Regulation 9. As amended Dec. 12, 1908. F. I. D. 99.

to cover and no more. The regulations do not require any particular form to be used. Where there is a dealing in a great variety of products, coming in original unbroken packages from many sources, care should be exercised to avoid so drawing a guaranty as to assume responsibility for the quality and character of goods of which the guarantor can not be absolutely sure; and this is especially true of imported products. Any jobber or wholesaler purchasing products under a proper guaranty may safely guaranty them to his own vendee. Care should be taken by him to see that the guaranty under which he purchased sufficiently identifies the products purchased, so that they may be readily traced. But if a guaranty be accepted in good faith by a dealer it will be sufficient to bind the guarantors, technical defects in the guaranty not relieving the guarantor. A manufacturer, wholesaler or jobber is not liable for statements placed upon labels attached by other persons to products he manufactures or sells; and if he has given a guaranty with such products when he sold them, his guaranty can not be varied by the vendee attaching to them labels containing statements not covered by the guaranty and thereby bind him, the guarantor. It would be otherwise if the producer attached labels supplied by the vendee and then issued his guaranty.

§ 486. Serial Number Guaranty.

“As a result of the numerous requests for specific information on various points connected with the filing of general guaranties with the department, as well as on the use of serial numbers after they have been assigned, the following general instructions bearing on these questions are issued for the guidance of those interested:

“(a) For information regarding the serial number guaranty, see Rules and Regulations for the Enforcement of the Food and Drugs Act (Circular 21), Regulation 9, and Food Inspection Decisions 40, 70, 72, and 83.

“(b) Articles to be guaranteed may be referred to in the guaranty in the following ways:

(1) By name.

(2) By use of general terms. For example, proprietary medicines, extracts, carbonated waters, etc., using the proper terms to cover the line or lines sold.

(3) By stating in the space reserved for listing articles "all articles which are now or which may hereafter be manufactured, packed, distributed or sold by.....," in which case the serial number can be used on all foods or drugs, subject to the Act, manufactured or owned and sold by the guarantor.

"(c) The formulae of preparations are not required to be given.

"(d) The serial number guaranty should not be used on articles not entitled to bear such a guaranty. For example:

(1) Those of a character which are not included in the definition of articles within the purview of the Act as given in Section 6 found on page 17 of Circular 21.

(2) Those subject to the meat inspection law, i. e., meat and meat food products of domestic origin or manufacture derived from cattle, swine, sheep and goats. (Imported meat and meat food products are subject to the food and drugs Act and may be guaranteed by means of a serial number or guaranty.)

(3) Those used in the arts and for technical purposes.

"(e) A serial number assigned to a guaranty can be used on any article covered therein to which the Act applies. (See b.)

"(f) Products not covered by the guaranty on file at the department can be added thereto by executing another guaranty covering them to be filed as a supplement to the original instrument. (See b.)

(g) The serial number guaranty can be printed either directly on the principal label or appear on a supplemental label or poster attached to the goods.

"(h) Only a resident of the United States can make a valid guaranty. (See Food Inspection Decision 62.)

"(i) The general guaranty filed with the department must be executed by the person, company, association or corporation who assumes responsibility for the goods, or by his or its agent thereunto lawfully authorized, and the authority of such agent must plainly be made to appear when the guaranty is offered to be filed.

“(j) Full information relative to the signing of the guaranty instrument appears at the bottom of the blank form of guaranty.

“(k) The signature should be acknowledged before a notary public or other official authorized to administer an oath. The seal of such official should always be affixed to the document.”¹

§ 487. Use of Guaranties and Serial Numbers.

“A misapprehension exists as to the requirements of the regulations for the enforcement of the Food and Drugs Act, June 30, 1906, in regard to placing the serial number on articles manufactured by persons who have filed a guaranty with the department and to whom a serial number has been issued identifying the said guaranty. Many have the impression that if a guaranty be filed the serial number which is assigned thereto must be used on all foods or drugs manufactured by them.

“Regulation 9 provides two general methods of guaranty. The first is described in subdivision (b) of Regulation 9, as follows:

“(b) A general guaranty may be filed with the Secretary of Agriculture by the manufacturer or dealer and be given a serial number, which number shall appear on each and every package of goods sold under such guaranty with the words, “Guaranteed under the Food and Drugs Act, June 30, 1906.”

“The second is described in subdivision (d) of Regulation 9, as follows:

“(d) If the guaranty be not filed with the Secretary of Agriculture as above, it should identify and be attached to the bill of sale, invoice, bill of lading, or other schedule giving the names and quantities of the articles sold.”

“The statement in subdivision (b), that when a guarantor is assigned a serial number the said number shall appear, should not be construed as mandatory. The meaning is that if a manufacturer wishes to make effective the guaranty

¹ F. I. D. 72.

filed with the department, he must place the legend and serial number on his goods, otherwise no protection is afforded to his customers in the absence of a special agreement or the alternative as provided in subdivision (d) of Regulation 9.

"Regulation 9, in its entirety, is intended to provide for the enforcement and administration of section 9 of the Food and Drugs Act, which reads as follows:

'SEC. 9. That no dealer shall be prosecuted under the provisions of this Act when he can establish a guaranty signed by the wholesaler, jobber, manufacturer, or other party residing in the United States, from whom he purchases such articles, to the effect that the same is not adulterated or misbranded within the meaning of this Act, designating it. Said guaranty, to afford protection, shall contain the name and address of the party or parties making the sale of such articles to such dealer, and in such case said party or parties shall be amenable to the prosecutions, fines, and other penalties which would attach, in due course, to the dealer under the provisions of this Act.'

"A study of the law in connection with the regulations makes it apparent that the intention is to provide a means whereby the manufacturer can assume responsibility under the law for the character of the goods manufactured by him, after they have passed out of his possession into the hands of the person who purchased them from him. In no case is a guaranty a good defense, unless it be from the person who sold the goods to the person offering the guaranty as a defense. In order to simplify the procedure, the department volunteers to act as custodian of the guaranty, which is an offer on the part of the manufacturer to free dealers, reselling his goods, from responsibility, under the law, for possible misbranding or adulteration. In order that the guarantor may convey this intention on his part to purchasers of his goods, a serial number is assigned to such guarantor, and by placing this number on his goods he fixes his responsibility. Whether he desires to enter into an agreement of this kind with the purchaser of his goods is a matter wholly within his discretion, and he can use the serial number or not for this purpose, as he may please. The use of the number will save the trouble of individual guaranties with each

individual transaction or each individual customer. In other words, the label itself will carry notice that the manufacturer holds himself responsible, under the law, to the persons who purchase goods directly from him, for any misbranding or adulteration."¹

§ 488. Effect of the Guaranty.

If food or drugs be sold under a sufficient guaranty, and it or they be adulterated or misbranded, the effect is to transfer the liability incurred because of a resale by the purchaser to the person giving the false guaranty,—the guarantor. If the guaranty be not sufficient, then the person reselling them will be liable the same as if he never had had a guaranty, and it makes no difference if he was not aware of their adulteration or misbranding. "In no case is a guaranty a good defense, unless it be from the person who sold the goods to the person giving the guaranty as a defense."¹ The guaranty must be signed by the wholesaler, jobber, manufacturer or other party residing in the United States, from whom the purchaser purchased the articles. It therefore follows that the purchaser from the person purchasing them under a guaranty can not invoke the guaranty as his protection if they be adulterated or misbranded. In case a serial number has been assigned the manufacturer he may use that upon the package in this form: "Serial No. —. Guaranteed under the Food and Drugs Act, June 30, 1906." This number is allotted by the Secretary of Agriculture to the manufacturer, upon the latter filing with him a general guaranty; and to place the legend above quoted on a package when no such guaranty has been so filed is to misbrand it. The following plea in defense has been held sufficient:

"The plea of John W. James, defendant, to the information of the United States filed May 24, 1909.

"This defendant by protestation, not confessing or acknowledging all or any of the matters or things in the information mentioned to be true

¹ F. I. D. 72.

¹ F. I. D. 72.

in the manner and form as the same are thereby set forth and alleged, doth plead thereto and for plea by leave of the court first had and obtained says, that the said United States ought not to further prosecute the information against him, the said John W. James, because the said information is fatally defective in having failed to set forth the exception of the statute as set forth in Section 9 of the Food and Drugs Act of June 30, 1906.

"Section 9 states as follows: 'That no dealer shall be prosecuted under the provisions of this Act when he can establish a guarantee signed by the wholesaler, jobber, manufacturer or other party residing in the United States, from whom he purchased such article to the effect that the same is not adulterated or misbranded within the meaning of this Act.'

"That the defendant, John W. James, has such a guarantee, as appears by the guarantees hereto annexed.

"JOHN BENE
Manufacturing Chemist
HYDROGEN Solution of DIOXIDE
Hydrogen Peroxide
641-645 DEAN ST., near Vanderbilt Ave.,
Brooklyn, N. Y.
April 5, 1907.

"Messrs. Towns & James,
Brooklyn, N. Y.

"Gentlemen:—

"Your letter of the 3rd to hand and contents noted, and in reply, I am unable to supply you the hydrogen dioxide at a lower price than you are now paying. If you will figure that I am selling you the gallons at 60c, the five pounds at 50c inclusive, and the one pounds at \$20.00 per gross inclusive, you will readily see that it is a very low price for a strictly U. S. P. hydrogen dioxide, guaranteed under the Food and Drugs Act.

"Regarding the serial number I made application to Washington a few months ago, but my papers were returned as I had not properly filled out the form. The new form was sent a few days ago and I am expecting a serial number every day, and as soon as it arrives will let you know, so that you can use same on the hydrogen dioxide if you so desire.

"Hoping this satisfactory, I remain,

Yours respectfully,

Dis.

(Sgd.) John Bene."

and on April 12, 1907, the further authorization to use such guarantee of serial number if he so desired:

"JOHN BENE
MANUFACTURING CHEMIST
HYDROGEN Solution DIOXIDE,
Hydrogen Peroxide
Office & Laboratory
641-645 Dean St., nr. Vanderbilt Ave.

•

"Messrs. Towns & James,
Brooklyn, N. Y.

"Gentlemen:—

"We received our serial number which is 8890, and will use it on all your orders for hydrogen dioxide in future which I trust will be satisfactory.

"Yours respectfully,

(Sgd.)

John Bene."

"Dic."

"Further than that from December 7, 1906, to January 27, 1909, the defendant, John W. James, received a larger number of invoices for the peroxide of hydrogen used by them and shipped in a manner as set forth in the information, of which the following are samples:

"JOHN BENE
Manufacturing Chemist
HYDROGEN SOLUTION OF DIOXIDE
Hydrogen Peroxide
Office & Laboratory
641-645 Dean St. near Vanderbilt Ave.
Brooklyn, N. Y., July 3, 1908.

"Sold to Towns & James,

Terms 30 days net, 1 percent ten days	Brooklyn, N. Y.
105 lbs. hydrogen dioxide, U. S. P. 3 percent, .05.....	5.25
1 boxed carboy	1.50

\$6.75

"No. 8890—Guaranteed under
the Food and Drugs Act,
June 30, 1906.

John Bene,
Borough of Brooklyn,
New York.

JOHN BENE
MANUFACTURING CHEMIST
HYDROGEN Solution of
Hydrogen Peroxide
Office & Laboratory
641-645 Dean St., near Vanderbilt Ave.
Brooklyn, N. Y., April 18, 1908

DIOXIDE

"Sold to Towns & James,

Brooklyn, N. Y.

Terms 30 Days net, 1 percent ten days.

12 gals. hydrogen dioxide, U. S. P. 3 percent .60.....	7.20
--	------

\$7.20

No. 8890—Guaranteed under

"That the peroxide of hydrogen mentioned in the information and above set forth was purchased from the said John Bene, whose guarantee is also set forth above; that the said John Bene is a resident of the United States; that the defendant, John W. James, has therefore complied with all the requirements of said Food and Drugs Act and is not liable under this information, all of which matters this defendant doth aver and plead in bar, and the defendant prays judgment that the information be dismissed and he be discharged from custody."²

§ 489. Statute Construed—When Reseller not Liable.

This section was construed by Judge Grubb, of the District Court of the Northern District of Alabama, in a charge to a jury, as follows:

"Proof of the absence of knowledge on the dealer's part that the article is obnoxious to some of the provisions of the Act is only a defense when the article is purchased from a manufacturer, and a guaranty taken from the manufacturer that it complies with the requirements of the Act. The second section of the Act prohibits the introduction into interstate commerce of any article of food, or drugs, which is adulterated or misbranded. The ninth section provides that no dealer shall be prosecuted under the provisions of the Act when he can establish a guaranty, signed by the manufacturer from whom he purchased such articles, to the effect that the same article is not adulterated or misbranded within the meaning of the Act; in which case, the manufacturer shall be amenable to the prosecutions, fines, and other penalties, which would otherwise attach to the dealer. The purpose of Congress was to place liability for the violation of the law upon some one in each instance. Primarily the liability is on the dealer who introduces the article into interstate commerce. The liability can be shifted from the dealer only by imposing the same liability upon the manufacturer. This can be done only by virtue of the manufacturer's guaranty to the dealer. If, for any reason, the guaranty is insufficient to impose liability upon the manufacturer, it remains where it primarily rested, upon the dealer. To have the effect of releasing the dealer from liability for the violation of the Act complained of in this prosecution, the guaranty must be of a character to impose liability for the same violation upon the manufacturer, if he were substituted for these defendants in this case; otherwise, both parties would escape liability, and the purpose expressed by Congress be defeated. The Act says that the manufacturer, who signs the guaranty, shall be subject to the same prosecution and penalties as the dealer. If a conviction could be sustained

² N. J. 575; N. J. 216.

against the manufacturer upon its guaranty, if substituted for the defendants in this case, then the taking of the guaranty by defendants would be no defense to their violation of the law in reference to the shipment in question, though they had no knowledge that it was adulterated or misbranded. In order for the manufacturer's guaranty to be effective to impose liability upon him for any violation of law as to the article, which is the basis of this prosecution, the guaranty must relate to the identical article introduced into interstate commerce by the defendants as dealers. Otherwise the answer of the manufacturer to the prosecution would be, that he had never guaranteed the article shipped by the dealer, and the answer would be complete. Change of the original package might not constitute a change of identity. In this case there was more. The manufacturer furnished the dealer with the extract, and the dealer shipped the syrup. Commercially, if not chemically, the two were different. The extract was a mere constituent of the syrup, and not the syrup itself. The manufacturer did not guarantee the article shipped by the dealer, and on which this prosecution is based, could not be convicted for the violation of the Act, charged against the defendants in relation to it, any reason of the guaranty, and for that reason the taking of the guaranty was not a protection to the defendants. When they changed the identity of the extract, they elected to abandon the protection of the manufacturer's guaranty, and were responsible for the character of the new article, the syrup, made and shipped by them, or under their authority. Neither the defendants' want of knowledge of the presence of cocaine in the extract, nor the guaranty taken by them from the manufacturer, would excuse their failure to properly brand the jug, under this count of the information,"¹

§ 490. Manufacturer Selling Goods within State to be Shipped out of it—Liability.

The Pure Food and Drugs Act for its validity rests upon the interstate clause of the Constitution; but that fact does not enable a manufacturer giving a false guaranty from being prosecuted merely because the food or drug be sold to a dealer in the State where he manufactured it, if he sold it with the intent that it be put into interstate commerce. In one case it was contended that a manufacturer who gives a false label is not liable if he sells the adulterated product in the State where he manufactured it. In discussing this question the court said: "It is not contended by the defendant that Congress has no constitutional right to pro-

¹ N. J. 326; United States v. Mayfield, 177 Fed. 765.

hibit the introduction of adulterated and misbranded foods in interstate commerce, but the claim is that so far as the defendant's connection with the adulterated and misbranded goods was concerned, the entire transaction of manufacturing, selling and delivering by it was consummated within the State, as was the issuance of the false certificate, and as the defendant's connection with the article was entirely within the State, the fact that the certificate indicates that the adulterated and misbranded commodity was intended for interstate commerce can make no difference because the Federal courts could have no jurisdiction, whatever the intention of the manufacturer might be, until such goods had been shipped or entered with a common carrier for transportation to another State, or had been started upon such transportation in a continuous route or journey.¹

There is nothing in the Act to indicate that there is an effort on the part of Congress to regulate the manufacturing, selling or delivering of any articles of food within the States. The Act is intended to prevent adulterated and misbranded foods from being sold in interstate commerce; nothing more, and in order that this may be accomplished it prohibits the party who makes or manufactures the food and who knows what it contains from falsely assuring an innocent purchaser that its quality and dress lawfully entitles him to sell the commodity in interstate commerce. Such a certificate, made by a defendant, expressly under the provisions of the Act, if false, could have been made with no purpose other than to defeat the object of the Act. This prohibition is obviously essential to the enforcement of one of the important powers with which Congress is intrusted, to wit: the regulations of interstate commerce.

To punish the dealer who sells the article in another State will not in all cases reach the evil sought to be remedied. He may be entirely innocent of any intention of selling an adulterated or misbranded food, because he may be unable to tell the difference between a pure article and one adulter-

¹ Counsel cited to this proposition *Kidd v. Pierson*, 128 U. S. 1, 5 Sup. Ct. 6, 6 L. Ed. 32, affirming 72 Iowa 348, 34 N. W. 1.

ated, and dealers can not be expected to employ expert chemists to examine the great variety of commodities which enter into commerce and are dealt in by them; but the evil can soon be cured if the innocent dealer may shift the responsibility for the purity of the commodity to the manufacturer by requiring him to certify to the effect that the article is not adulterated or misbranded, when the manufacturer knows he will be subjected to punishment in case he gives a false certificate prohibited by the Act.

In the case of *United States v. Fox*,² in passing upon the provision in the bankrupt law which made it a misdemeanor, punishable by imprisonment, for obtaining goods under false pretense with intent to defraud, within three months of the commencement of bankruptcy proceedings, the court held that as this would be no offense under the Act of Congress at the time of the commission of the false pretense, that any subsequent independent act by the party himself or a third party in instituting bankruptcy proceedings, could not make it a crime punishable in the Federal courts. In the discussion of the question, it was said by Justice Field, that "the criminal intent essential to the commission of a public offense must exist when the act complained of is done; it can not be imputed to a party from a subsequent independent transaction. There are cases, it is true, where a series of acts are necessary to constitute an offense, one act auxiliary to another in carrying out the criminal design.

In this case the criminal intent essential to the commission of the offense existed at the time defendant gave the certificate specifying that it was under the Pure Food Act of Congress of June 30, 1906. With what purpose and intent was the certificate given other than for the purpose of evading the provisions of this Act of Congress? It is averred defendant made and knew the goods were both adulterated and misbranded, and with this knowledge gave a certificate that they were not adulterated or misbranded in order that an innocent purchaser might sell them in interstate com-

² 95 U. S. 670, 24 L. Ed. 538.

merce, and, in this case, the purpose of the certificate was accomplished. The dealer did just what the defendant intended he should do; that is, the dealer relying on the certificate sold the articles in another State. "Any act committed with a view of evading the legislation of Congress, passed in the execution of any of its powers, or of fraudulently securing the benefit of such legislation, may properly be made an offense against the United States."

§ 491. Abuse of Guaranty for Advertising Purposes.

"The attention of the department has been called repeatedly of late to the abuse, for advertising purposes, of the serial number assigned to a guaranty. The Department of Agriculture accepts no responsibility for the guaranty which the manufacturer or dealer files. Particular attention must be paid to the fact that it must neither be directly stated or implied in any fashion that the Department of Agriculture or the United States government guarantees or indorses the products to which the guaranty and serial number are attached. The guaranty represented by the serial number is the guaranty of the manufacturer and not of the government.

"To facilitate business a serial number is assigned to this guaranty, and the guaranty is filed in the Department of Agriculture for the purpose of verifying the serial number when it is used on packages of goods.

"The misuse of the serial number is a misrepresentation, and in each case of such an abuse the serial number will be withdrawn and the guaranty returned after proper notice. Serial numbers, however, which have been issued and passed into commerce prior to withdrawal will be respected by the department in any action which may be brought against dealers selling goods bearing the number which is improperly used.

"The attachment of the serial number or guaranty to articles which are not foods or drugs is also regarded as a misrepresentation on which a similar action will be based."¹

¹ F. I. D. 70.

§ 492. Applies only to Unbroken Packages.

The guarantor is responsible only for products which reach the consumer in the same condition in which they left his hands. He is responsible only so long as the package remains unbroken, and if it be opened by the retailer, whether resold or not, the guarantor is relieved, and the retailer thereby assumes responsibility for adulteration or misbranding whether he actually knows of the adulteration or misbranding or not.

§ 493. Retailer Knowing that Guaranty is False.

Suppose the retailer knows that the guaranty accompanying products he sells is false. Is he liable for selling adulterated or misbranded goods? The rule is that a retailer selling unguaranteed products is liable if they be adulterated or misbranded even if he did not know of the adulteration or misbranding. The statute makes him liable. And the only way he can escape from liability for a sale of adulterated or misbranded products is that he sold them under a guaranty. That statute was enacted for his protection; and he must see that its provisions are followed if he would escape. It is the opinion of the writer that if the retailer had nothing to do with the execution of the false guaranty, but ascertained it was false after he acquired the adulterated or misbranded product, he will not be liable if he resell it, though he knows at the time it is adulterated or misbranded; but if he had anything to do with the adulteration or misbranding or of the execution of the false guaranty he probably would be liable. In the case of a sale of adulterated or misbranded products that have been guaranteed, the guarantor is liable to a criminal prosecution; and to punish both the retailer and the guarantor for the sale is practically inflicting two penalties for one transaction; but when the retailer actively participates in the adulteration or misbranding or in the execution of the false guaranty he practically becomes particeps criminis with the guarantor.

**§ 494. Issue of a Guaranty Bond for a Former Guaranty—
Opinion of Attorney-General.**

“November 11, 1907.

“The Honorable The Secretary of Agriculture:

“Sir: I have the honor to acknowledge the receipt of your letter of September 10, in which you request my opinion upon a question which has arisen in your department in the administration of the Food and Drugs Act of June 30, 1906, in a class of cases of which the following is a type:

“An examination having been made in the Bureau of Chemistry, in accordance with section 4 of the Act, of a sample of food purchased from a retail dealer in the District of Columbia, and the food having been found to be adulterated, the dealer was cited for a hearing, and, having appeared, established as a defense under which he claimed protection a written guaranty, conforming to the requirements of section 9 of the Act, from a Maryland wholesaler who had sold him the food and shipped it to him in the District of Columbia in the exact condition in which he sold it here.

“The Maryland wholesaler, having been then cited, in turn appeared and established a similar guaranty, under which he also claimed protection, from a Pennsylvania manufacturer who had sold him the food and had shipped it to him in Maryland in the exact condition in which he had, in turn, guaranteed it and shipped it to the retailer in the District of Columbia.

“The question upon which my opinion is requested is whether, upon such a state of facts, the Maryland wholesaler is amenable to prosecution for violation of the Act or is protected by the guaranty from the Pennsylvania manufacturer.

“By section 2 of the Food and Drugs Act¹ it is made a misdemeanor, *inter alia*, to ship any adulterated or misbranded food or drugs in interstate commerce, or to receive the same in such commerce, and, having so received, to deliver the same to any other person in original, unbroken

¹ 34. U. S. Stat. at Large 768.

packages, or to sell the same in the District of Columbia.

“Section 9 of the Act further provides:

‘That no dealer shall be prosecuted under the provisions of this Act when he can establish a guaranty signed by the wholesaler, jobber, manufacturer, or other party residing in the United States, from whom he purchases such articles, to the effect that the same is not adulterated or misbranded within the meaning of this Act, designating it. Said guaranty, to afford protection, shall contain the name and address of the party or parties making the sale of such articles to such dealer, and in such case said party or parties shall be amenable to the prosecutions, fines, and other penalties which would attach, in due course, to the dealer under the provisions of this Act.’

“After careful consideration of this Act, together with the memoranda prepared by the members of the Board of Food and Drug Inspection, which you have submitted with your letter, I am of the opinion that the guaranty from the Pennsylvania manufacturer affords complete protection to the Maryland wholesaler and that he is hence not amenable to prosecution under the Act on account either of the interstate sale and shipment made by him to the retailer in the District of Columbia or of the guaranty given by him in connection therewith.

“1. It is clear that the Maryland wholesaler is protected from prosecution for the interstate sale and shipment made by him, by the explicit provision of section 9, that ‘no dealer shall be prosecuted under the provisions of this Act when he can establish a guaranty signed by the wholesaler, jobber, manufacturer, or other party residing in the United States, from whom he purchases such articles, to the effect that the same is not adulterated or misbranded within the meaning of the Act.’

“The broad term ‘dealer’ which is used in this section, not being restricted in its meaning by any other provision of the Act, includes those who deal at wholesale as well as those who deal at retail. I am of the opinion, therefore, that under the plain language of this provision any dealer, whether a wholesaler or retailer, who would otherwise be amenable to prosecution for dealing in an adulterated or misbranded article in violation of the Act, is protected from prosecution

on such account by establishing a guaranty in conformity with the requirements of the Act, signed by a resident of the United States from whom he purchased such article.

"2. A more difficult question, however, arises in reference to the liability of the Maryland wholesaler to prosecution by reason of the guaranty which he gave the District of Columbia retailer in connection with the sale and shipment to him.

"It is expressly provided by section 9 of the Act that wherever a dealer who would otherwise be subject to prosecution establishes a guaranty from a resident of the United States who sold him the articles, the dealer is thereby protected, and such guarantor 'shal be amenable to the prosecutions, fines, and other penalties which would attach, in due course, to the dealer under the provisions of this Act.' Construing this section in its entirety, I am of the opinion that its purpose was to create, in addition to the offense of manufacturing and dealing in adulterated and misbranded food and drugs specifically made misdemeanors by sections 1 and 2 of the Act, the distinct and substantive offense of guaranteeing, under the Food and Drugs Act, any adulterated or misbranded article—thereby enabling the purchaser to deal with such articles in a manner otherwise forbidden without being amenable to the punishment to which he would otherwise be subject—the offense of giving such false guaranty, however, not to be complete until the purchaser deals with the article thus guaranteed in a manner otherwise punishable by the Act, in which event the guarantor would become subject to the same punishment for giving the false guaranty as that to which the purchaser would otherwise be amenable by reason of his dealing with the article.

"Without discussing the scope and effect of this provision, I am of the opinion that whatever this may be, the maker of a false guaranty is just as much protected from any prosecution to which he might be liable on this account by establishing a former guaranty from the person from whom he purchased the article as he is thereby protected from prosecution for dealing with the article in a manner otherwise for-

bidden by the Act; in other words, that the former guaranty is a complete protection against any prosecution under this Act.

"It is true that section 9 does not specifically state that the first guaranty shall protect the second guarantor, but this result follows from the broad provision that 'no dealer shall be prosecuted under the provisions of this Act when he can establish a guaranty signed by the . . . party . . . from whom he purchases such articles.' As a prosecution for the false guaranty would be a prosecution 'under the provisions' of the Act, and as the dealer's protection under his vendor's guaranty is not limited by the Act to prosecutions for dealing in the articles, but includes all prosecutions under its provisions, a former guaranty would in my opinion afford a dealer protection against the punishment to which he might otherwise be amenable for his own false guaranty as well as for selling or shipping the article in violation of the Act.

"In short, the intention of Congress appears to have been to relieve from liability any person who would otherwise be subject to any prosecution under the Act if he establishes a guaranty from the person who sold him the goods, provided such person is a resident of the United States and therefore himself within the reach of prosecution, and to make such original guarantor subject to prosecution in lieu of the subsequent offender, Congress evidently intending to refer back liability in such case, in general, to the original guarantor, who, of course, in the case of goods of domestic production, would usually be the manufacturer, who would know their real character, and, in the case of goods imported from a foreign country, would be the importer, who would assume responsibility therefor, and to make the liability to punishment fall upon such original guarantor so far as possible.

"It further appears from the report of the House Committee on Interstate and Foreign Commerce, which reported the food and drugs bill for passage in substantially the form in which it was afterwards enacted, and which, under the

doctrine of *Church of Trinity v. United States*,² and *Binns v. United States*,³ may be properly looked to for the purpose of throwing light upon the intent of Congress, that the provision in question was inserted in the bill by the committee and that its general purpose was to protect persons dealing in the articles subsequent to the manufacturer or importing agent and direct the penalty to the original guarantor as far as possible. The committee in its report said:

'As the principal purpose of the bill is to prevent interstate and foreign commerce in adulterated or falsely branded articles of food, drink, and medicine, the committee has inserted in the bill a provision intended to protect all persons dealing in the articles subsequent to the manufacturer or importing agent.

'Section 8 of the bill provides that no dealer shall be convicted when he is able to prove a guaranty of conformity with the provisions of the Act signed by the manufacturer or the party from whom he purchased. The section requires that the guarantor shall reside within the United States and that the guaranty shall contain his full name and address.

'In other sections of the bill there are provisions for collecting samples or specimens and the examination of such in order to determine whether they are adulterated or misbranded, and the bill provides that any party from whom a sample was obtained shall be given an opportunity to be heard before the Secretary of Agriculture shall certify to the United States district attorney the results of an examination of the article as the basis for prosecutions; so that if samples of goods shall be taken from a retail or wholesale dealer who has received a guaranty of conformity with the provisions of the Act from the person who sold to him, he will be relieved from prosecution, and any penalty which may attach under the Act will be directed to the original guarantor.

'These carefully prepared provisions of the bill will prevent any dealer being put to the expense of a prosecution when he takes the precaution to protect himself by requiring a guaranty.'⁴

"And again:

'The prosecutions which will be commenced by the national authorities will be mainly directed against the manufacturers of food products; or, if it be impossible to find the manufacturer, against the jobbers and wholesale dealers.'⁵

² 143 U. S. 457, 12 Sup. Ct. 511,
36 L. Ed. 226, reversing 36 Fed.
303.

³ 194 U. S. 486, 24 Sup. Ct. 816,
48 L. Ed. 1087.

⁴ Ho. Rep. 2118, 59th Cong. 1st
Sess., p. 3.

⁵ Ho. Rep. 2118, 59th Cong. 1st
Sess., p. 9.

"Section 8 of the bill which was thus inserted by the committee reads as follows:

"That no dealer shall be convicted under the provisions of this Act when he is able to prove a guaranty of conformity with the provisions of this Act in form approved by the rules and regulations herein provided for, signed by the manufacturer or the party or parties from whom he purchased said articles: Provided, That said guarantor resides within the United States. Said guaranty shall contain the full name and address of the guarantor making the sale to the dealer, and said guarantor shall be amenable to the prosecutions, fines, and other penalties which would otherwise attach in due course to the dealer under the provisions of this Act.'⁶

"It will be seen that the provisions thus inserted and commented upon by the committee is substantially the same, so far as the present question is concerned, as section 9 of the bill as afterwards enacted, and it is made clear by this report that it was the intent of the committee, at least, in inserting this provision to entirely relieve from prosecution any retail or wholesale dealer who has received a guaranty from the person from whom he purchased, and, as stated by the committee, to 'prevent any dealer from being put to the expense of a prosecution when he takes the precaution to protect himself by requiring a guaranty.'

"Any other construction of this Act would work great hardship upon an innocent intermediary who, relying upon the guaranty which he receives from the original manufacturer of an article, sells it in interstate trade and guarantees it in his turn. And if the original guaranty does not fully protect him in such case, it would become exceedingly hazardous to sell and guarantee such article, even though guaranteed by the manufacturer, without first making, on his own account, a detailed investigation, chemical or otherwise, to ascertain whether it is in fact adulterated or misbranded. Manifestly, however, such a requirement would in many cases seriously impede and obstruct interstate trade.

"It is stated in Dr. Dunlap's memorandum that, from the conditions that the Board of Food and Drug Inspection has

⁶ Ho. Rep. 2118, 59th Cong. 1st Sess., p. 11.

found to exist throughout the whole business community, dealers engaged in interstate trade are insisting on a guaranty from the seller and purchasing only such guaranty; that in order to do an interstate business to-day a dealer must give a guaranty with the goods he sells, whether he be the actual manufacturer or not; and that if the dealer can not rely upon the manufacturer's guaranty as a protection, it must have the effect of preventing interstate sales on the part of small concerns, and, even of large concerns who probably would not care to incur the added expense and trouble, in many cases prohibitive, of having the goods carefully analyzed in order to be fully acquainted with their character.

"There is, however, a presumption against a construction of a statute which 'would cause grave public injury or even inconvenience.' And it was said by Lord Coke, in language which was quoted by Abbott, C. J., in *Margate Pier Co. v. Hannam*,⁸ that: "Acts of Parliament are to be so construed as no man that is innocent or free from injury or wrong be, by a literal construction, punished or endamaged."

"The construction which I have given the Act is furthermore supported by the view expressed in *Greeley's Food and Drugs Act*,⁹ that:

'A wholesaler or jobber who purchases food or drug products from the producer or from anyone else may safely guarantee the goods so purchased to his customers, provided he has from the producer or other person from whom he purchased the goods a guaranty covering them.'

"For these reasons, I am of the opinion that in the case stated the Maryland wholesaler is not amenable to prosecution under the Act, but is completely protected by his guaranty from the Pennsylvania manufacturer.

"3. I should add, however, that the fact that both the District of Columbia retailer and the Maryland wholesaler are protected from prosecution by the guaranties which they

⁷ Citing *Bird v. United States*, 187 U. S. 118, 23 Sup. Ct. 42, — L. Ed. —.

⁸ 3 B. & Ald. 266," and cited

with approval in *Church of Trinity v. United States*, 143 U. S. 457, 12 Sup. Ct. 511, 36 L. Ed. —.

⁹ Section 65, p. 4.

have established from their respective vendors, does not, in my opinion, exempt the adulterated food from confiscation under section 10 of the Act, which provides, inter alia, that any adulterated or misbranded food or drug which is being transported in interstate commerce for sale, or, having been transported, remains unloaded, unsold, or in original, unbroken packages, or is sold or offered for sale in the District of Columbia, may be proceeded against in the district where found 'and seized for confiscation by a process of libel for condemnation.' The provision of section 9 that no dealer shall be prosecuted when he establishes a guaranty from his vendor merely affords protection, in my opinion, against the criminal prosecution, fines, and other penalties to which the dealer would otherwise be personally amenable, and does not in any way affect the liability of the merchandise to confiscation under the provisions of section 10.

"Respectfully,

"Charles J. Bonaparte,

"Attorney-General." ¹⁰

§ 495. Guaranty on Imported Goods.

"Many inquiries of the following type have been received by the department:

'We will take it as a favor if you will advise us if (since our goods are all imported and so must pass the custom-house before being sold) the fact of their having passed the customs authorities and the Department of Agriculture examination is not in itself a guaranty that they conform with the pure food laws as defined by the Act of Congress approved June 30, 1906, entitled "An Act for preventing the manufacture, sale, or transportation of adulterated or misbranded or poisonous or deleterious foods, drugs, medicines, liquors," etc.'

"The department makes a systematic inspection of imported foods and drugs when they arrive at the custom houses; and while such inspection does not include an examination of samples taken from every package of the aforesaid articles, it is sufficient to indicate that the article is

¹⁰ F. I. D. 83.

suitable to enter the country and be sent into interstate commerce as long as it retains its identity in the unbroken package. If imported foods and drugs are taken from the original packages and repacked, they become subject to inspection as if of domestic origin, and the persons handling and selling said articles are not immune from prosecution in the event that a subsequent inspection discloses that all or any portion of said foods or drugs are adulterated or misbranded according to the provisions of said statute or the regulations made thereunder.

"Only a wholesaler, jobber, manufacturer, or other party residing in the United States can give a guaranty within the meaning of said Act. A foreign manufacturer or other foreign dealer can not give the guaranty prescribed in said law, nor can the agent of such foreign manufacturer or dealer give said guaranty unless such agent be a resident of the United States and unless he actually sells the goods covered by the guaranty.

"The person who owns and sells imported goods can make a guaranty for the purpose aforesaid, though the goods may be shipped directly by the firm of whom the guarantor buys them to the customer of the guarantor."¹

¹ F. I. D. 62.

CHAPTER IX.

PRACTICE UNDER ACT OF 1906.

- | SEC. | SEC. |
|---|---|
| 496. Collection of samples—Statute and regulations. | 507. Injoining food officer in the performance of his duties. |
| 497. Collection of samples—Comments. | 508. Proceedings in court. |
| 498. Number of samples purchased. | 509. Proceedings to secure a forfeiture—Libel. |
| 499. Notice of object of purchase. | 510. When forfeiture takes place. |
| 500. Analysis—Notice of result. | 511. A misbranding corrected before forfeiture proceedings begun. |
| 501. Hearing before Agriculture Department. | 512. No intent to violate statute. |
| 502. Seizure of adulterated and misbranded articles. | 513. Section 2 and Section 10 not interdependent. |
| 503. Bond for release of articles seized. | 514. Jury trial. |
| 504. Publication of result of examination or proceedings in court—Food inspectors' decisions. | 515. Costs in proceedings in rem, assessing against person. |
| 505. Appeal to the Secretary of Agriculture. | 516. Punishment—Infamous crime—Prosecution by information. |
| 506. Legality of referee bond. | 517. Liability of corporation and corporate officers. |

§ 496. Collection of Samples—Statute and Regulations.

Section three of the Food and Drugs Act provides: "That the Secretary of the Treasury, the Secretary of Agriculture, and the Secretary of Commerce and Labor shall make uniform rules and regulations for carrying out the provisions of this Act, including the collection and examination of specimens of foods and drugs manufactured or offered for sale in the District of Columbia, or in any Territory of the United States, or which shall be offered for sale in unbroken packages in any State other than that in which they shall have been respectively manufactured or produced, or which shall be received from any foreign country, or intended for

shipment to any foreign country, or which may be submitted for examination by the chief health, food or drug officer of any State, Territory, or the District of Columbia, or at any domestic or foreign port through which such product is offered for interstate commerce, or for export or import between the United States and any foreign port of entry." Pursuant to the power thus conferred, Regulation 3 concerning the collection of samples, was adopted. It provides that "samples of unbroken packages shall be collected only by authorized agents of the Department of Agriculture, or by the health, food or drug officer of any State, Territory, or the District of Columbia, when commissioned by the Secretary of Agriculture for this purpose. Samples may be purchased in the open market, and, if in bulk, the marks, brands, or tags upon the package, carton, container, wrapper, or accompanying printed or written matter shall be noted. The collector shall also note the names of the vendor and agent through whom the sale was actually made, together with the date of purchase. The collector shall purchase representative samples." "All samples shall be sealed by the collector with a seal provided for the [that] purpose." Section eleven of the Act also provides that "the Secretary of the Treasury shall deliver to the Secretary of Agriculture, upon his request from time to time samples of foods and drugs which are being imported into the United States or offered for import," for examination. In order that manufacturers and dealers may know that they are dealing with official inspectors the following form for their identification has been adopted:

United States Department of Agriculture,
Washington, D. C.,....., 190

This is to certify that....., whose
(Signature:)
signature is shown above and whose photograph appears opposite, stamped with the seal of the Department, is authorized to inspect establishments manufacturing and dealing in food and drugs and products entering into their manufacture, under the Food and Drugs Act, June 30, 1906.

This authorization expires.....

.....
(Secretary)

“In addition to the above, the form includes a photograph of the inspector, the whole bound in a stiff cover.”

§ 497. Collection of Samples—Comments.

Regulation 3 supplements the statute in providing the manner in which the samples shall be collected. Only a duly commissioned agent of the Department of Agriculture, or the health, food or drug officer of any State, Territory, or the District of Columbia, may collect samples. The health, food or drug officer of a State, Territory or the District of Columbia must also be commissioned by the Secretary of Agriculture if he collect samples under the Food and Drugs Act. Only by purchase can these samples be obtained, unless the owner voluntarily yields them up. A dealer can not be compelled to furnish specimens or samples, even upon the tender of the price. In this respect it does not go as far as some other pure food and drug statutes. No power is given the agent to open original packages to take samples, but in the case of imported food and drugs the Secretary of the Treasury under the Act of March 2, 1901, the provisions of which are repeated in subsequent agriculture appropriation Acts, may open packages to take samples. If samples are collected within a State, then they must be taken from “unbroken packages,” and they can not be taken in the State wherein they are manufactured or produced. Samples may be taken from packages received from foreign countries, or which are “intended for shipment to any foreign country.” These samples must be purchased in the “open market;” but if the owner of them has them in his store with other goods a purchase in such store would be a purchase in the open market. So would a purchase from a peddler be a purchase in the open market. Goods in bulk may be purchased in the Territories (including, of course, the insular possessions) and in the District of Columbia, but not in the States, for the statute has nothing to do with food or drugs in bulk within a State. It is only when such food or drugs are in the “original unbroken packages” that it applies to them,

But samples imported in bulk from foreign countries may be taken, although they are within a State and have not yet reached a Territory or the District of Columbia. The samples must be of a representative character, and must be sealed with the seal prepared for that purpose. The purpose of sealing them is to prevent the addition of foreign matter. If the sample be taken from a broken package, then no prosecution can be based upon the result of the analysis of its contents; but if the vendor were to break the package, knowing the object of the agent in purchasing it, before or after delivery to such agent, a prosecution could be based upon the result of the analysis. If the agents of the Department of Agriculture took the package after its delivery that would not destroy its evidentiary value nor prevent a prosecution based upon the result of an examination. Each sample must be sufficient to admit of its being properly analyzed;¹ but it is no objection that the sample delivered to the Bureau of Chemistry, through accident, afterwards becomes unfit for analysis.² If the package weigh over four pounds, or be in volume more than two quarts, then three packages of approximately the same size must be purchased and opened and divided into three parts. It is not clear from the rules when the purchase is in bulk that one of the parts need be given to the vendor upon request, but such is unquestionably their spirit and intention. When the package is in bulk, a sample can not be taken from the general bulk left after the separation of the part purchased; but the samples must come from the "bulk" sold. The separation must be from one undivided bulk.³ If the agent purchase several packages, open them and pour their contents together, and then separate them into three samples, that will not destroy

¹ *Lowery v. Hallard* [1906], 1 K. B. 398, 70 J. P. 57, 75 L. J. K. B. 249, 93 L. T. 884, 54 W. R. 520, 21 Cox C. C. 73, 4 L. G. R. 189.

² *Suckling v. Parker* [1906], 1 K. B. 527, 70 J. P. 209, 75 L. J. K.

B. 302, 94 L. T. 554, 54 W. R. 438, 21 Cox C. C. 145, 4 L. G. R. 531.

³ *Mason v. Cowdray* [1900], 2 Q. B. 419, 64 J. P. 662, 69 L. J. Q. B. 667, 82 L. T. 802, 49 W. R. 28, 19 Cox C. C. 536.

its evidentiary character.⁴ The persons collecting the samples must be the "authorized agents of the Department of Agriculture, or by the health, food, or drug officer of any State, Territory, or the District of Columbia, when commissioned by the Secretary of Agriculture for that purpose."⁵ But it does not follow that such agent may not have an assistant, and if the assistant assist him in making the purchase the fact will not destroy the evidentiary force of the sample.⁶

⁴Smith v. Savage [1905], 2 K. B. 88, 69 J. P. 245, 74 L. J. K. B. 576, 92 L. T. 775, 53 W. R. 477, 20 Cox C. C. 847, 3 L. G. R. 582.

In a Scottish case a milkman had a contract to supply a large amount of milk daily to a hospital, which he delivered in sixteen cans and poured them all into one large receptacle at the hospital. Before they were poured out, an inspector took a sample from each of a number of the cans, and had them analyzed separately. The court of justiciary held that the samples ought to have been mixed before analysis. Telford v. Fyfe [1907], Sess. Cas. (J.) 83. In this instance the milk was required to possess a certain percentage of milk fats or it would otherwise, though pure milk from the cow, be deemed adulterated.

⁵Regulation 3.

⁶Smith v. Stace, 45 J. P. 141. In this case a sanitary inspector under the English Sale of Food and Drugs Act, went with an assistant to a shop where butter was sold, and sent the assistant into the shop, who bought a pound of butter for a shilling. The assistant came out and gave it to the inspector, who, within two minutes, went inside the shop, and gave notice to

the shopkeeper that he had bought it for analysis, and he then and there divided it into three parts in pursuance of the statutes. The information was then laid by the inspector, and the court held that the purchaser of the article was the inspector, and not the assistant, and that therefore the inspector had properly given notice to the shopkeeper and laid the information.

Under the English statute the purchase may be made by deputy, and it is not necessary that the officer taking the proceedings should have acted personally in the purchase of the sample. Horden v. Scott, 5 Q. B. Div. 552, 44 J. P. 520, 795, 48 L. J. M. C. 97, 42 L. T. 660.

An inspector in England sent his servant into a public house to buy gin. When the servant had been in the house a minute and had paid for the gin with money supplied to him by the inspector for that purpose, the inspector entered, gave the usual notification as to the object of the purchase, and ultimately laid the information against the seller. This was held to be a purchase by the inspector and not by his servant. Garforth v. Esam, 56 J. P. 521.

In another case an inspector's

The purchase must be made for the purpose of analysis and not for consumption, it would seem. The agent acts in an official capacity when making the purchase, though that fact may not be known to the seller.⁷

§ 498. Number of Samples Purchased.

Regulation 3, in addition to other things, provides that "A sample taken from bulk goods shall be divided into three parts, and each shall be labeled with the identifying marks.¹ If a package be less than four pounds, or in volume less than two quarts, three packages shall be purchased, when practicable, and the marks and tags upon each noted as above. When three samples are purchased, one sample shall be delivered to the Bureau of Chemistry or to such chemist or examiner as may be designated by the Secretary of Agriculture; the second and third samples shall be held under seal by the Secretary of Agriculture, who, upon re-

duly authorized assistant went into a grocer's shop accompanied by a boy. The boy bought a pound of salt butter, and said it was for the public analyst. This was held to be a purchase by the inspector, the court saying: "I hold that a person who sends a messenger to buy the article of food for him is the purchaser within the meaning of the Act." *Macauley v. Mackirdy*, 3 *White's Rep. (Sc.)* 464.

So where an inspector asked a street scavenger to go into a shop and buy him butter, and gave him the money, and the scavenger did so, whereupon the inspector walked into the shop, and took over the butter. This was held to be a sale to the inspector. *Massey v. Kelso*, 4 *Fraser (J. C.)* 73, 39 *Sc. L. R.* 645. See also *Tyler v. Dairy Supply Co.*, 72 *J. P.* 132, 98 *L. T.* 867, 6 *L. G. R.* 422.

⁷ It must be admitted, however, that here we tread on uncertain ground. The English decisions on a similar point are not harmonious. *Parsons v. Birmingham Co.*, 9 *Q. B. Div.* 172, 46 *J. P.* 727, 51 *L. J. M. C.* 111, 30 *W. R.* 748; *Harris v. Williams*, 6 *T. L. R.* 47; *Ennis-killen Union v. Hilliard*, 14 *L. R. Ir.* 214; *Hotchin v. Hindmarsh* [1891], 2 *Q. B.* 181, 57 *J. P.* 775, 60 *L. J. M. C.* 146, 65 *L. T.* 149, 39 *W. R.* 607; *Buckler v. Wilson* [1896], 1 *Q. B.* 83, 60 *J. P.* 118, 65 *L. J. M. C.* 18, 73 *L. T.* 580, 44 *W. R.* 220; *Rex v. Mahoney* [1909], 2 *Ir. Rep.* 490.

¹ This refers to a preceding sentence which is as follows. "The collector shall also note the names of the vendor and agent through whom the sale was actually made, together with the date of the purchase."

quest, shall deliver one of such samples to the party from whom purchased or to the party guaranteeing such merchandise. When it is impracticable to collect three samples, or to divide the sample or samples, the order of delivery outlined above shall obtain, and in case there is a second sample the Secretary of Agriculture may, at his discretion, deliver such sample to parties interested. All samples shall be sealed by the collector with a seal provided for the [that] purpose." The Secretary of Agriculture is not bound to deliver the third package "to the party from whom purchased or to the party guaranteeing such merchandise," unless requested by him. If a request for it be made, then such sample must be delivered to him or the government will not be able to base a prosecution upon the result of examination. The delivery of the third part of the sample to the seller is for the purpose of notifying him that proceedings against him under the statute is contemplated. In the case of a guarantor, who is the person that may be guilty, the third part of the sample must be delivered to him and not to the seller, for the latter is protected by the guaranty he holds. The delivery need not be made immediately upon the purchase; and this is especially true where the guarantor resides in another State or at some distance.

§ 499. Notice of Object of Purchase.

In the previous section it is said that the delivery of the third part of sample to the seller has for its object the notification to him that the purchase was made to obtain a sample for analysis under the Food and Drugs Act. But inasmuch as this part is to be delivered to the seller only upon his request, and if no request be made no delivery is required, it would seem clear that notice to the seller that analysis of the product purchased is intended is not required. Neither the statute nor the regulations require such notice to be given.¹ The rights of the seller are in no way jeopardized

¹ The English statute requires by the seller "that the sample had the purchaser to "forthwith" notified the seller "that the sample had been purchased for the purpose of

by the lack of notice; for he is not bound by the result of the analysis.

§ 500. Analysis—Notice of Result.

Section four of the Food and Drugs Act provides that "the examinations of specimens of food and drugs shall be made in the Bureau of Chemistry of the Department of Agriculture, or under the direction and supervision of such bureau, for the purpose of determining from such examination whether such articles are adulterated or misbranded within the meaning of this Act." Regulation 4 provides that "unless otherwise directed by the Secretary of Agriculture, the methods of analysis employed shall be those prescribed by the Association of Official Agricultural Chemists and the United States Pharmacopoeia." Section four still farther provides that "if it shall appear from any such examination that any of such specimens is adulterated or misbranded within the meaning of this Act, the Secretary of Agriculture shall cause notice thereof to be given to the party from whom such sample was obtained." Regulation 5 construes this to mean that the notice must be given to the person who is responsible for the adulteration or misbranding. This means, if the food or drug has been guaranteed under section nine, that the notice must be given to the guarantor rather than to the retailer from whom the sample was actually purchased. So much of this Regulation 5 as is apropos here is as follows: "When the examination or analysis shows that the provisions of the Food and Drugs Act, June 30, 1906, have been violated, notice of that fact, together with a copy of the findings, shall be furnished to the party or parties from whom the sample was obtained or who executed the guaranty as provided in the Food and Drugs Act, June 30,

having it analyzed by the public analyst." The cases on this statute are *Barnes v. Chipp*, 3 Ex. Div. 47, 47 L. J. M. C. 85, 38 L. T. 570, 26 W. R. 635; *Wheeler v. Webb*, 51 J. P. 661; *Parsons v. Birmingham*

Dairy Co., 9 Q. B. Div. 172, 46 J. P. 727, 51 L. J. M. C. 111, 30 W. R. 748; *Smart v. Watts* [1895], 1 Q. B. 219, 59 J. P. 54, 64 L. J. M. C. 89, 71 L. T. 768, 43 W. R. 379, 18 Cox C. C. 62.

1906." This is not a notice that the examination or analysis will be made; it is simply notice of the result of the analysis or examination. As we have seen, notice that an analysis or examination will be made is not required. The only notice that an analysis or examination will be made is the indirect one arising from a delivery of a part of the sample taken upon the request of the person from whom it was procured.

§ 501. Hearing before Agricultural Department.

If the analysis or examination shows that the food or drug analyzed or examined is adulterated or misbranded, then notice of the result must be "given to the party from whom such sample was obtained." The notice is given by the Secretary of Agriculture, and a time is usually fixed therein for a hearing before that officer, or before "such other official connected with the food and drug inspection service as may be commissioned by him for that purpose." Section four provides that "Any party so notified shall be given an opportunity to be heard, under such rules and regulations as may be prescribed, . . . and if it appears that any of the provisions of this Act have been violated by such party, then the Secretary of Agriculture shall at once certify the facts to the proper United States district attorney, with a copy of the result of the analysis or examination of such article duly authenticated by the analyst or officer making such examination, under the oath of such officer." Regulation 4 provides, after prescribing that a notice shall be given that a hearing will be had "before the Secretary of Agriculture, or such other official connected with the food and drug inspection service as may be commissioned for that purpose," proceeds: "The hearings shall be had at a place, to be designated by the Secretary of Agriculture, most convenient for the parties concerned. These hearings shall be private and confined to questions of fact. The parties interested therein may appear in person or by attorney and may propound proper interrogatories and submit oral or written evi-

dence to show any fault or error in the findings of the analyst or examiner. The Secretary of Agriculture may order a re-examination of the sample, or have new samples chosen for further examination. If the examination or analysis be found correct the Secretary of Agriculture shall give notice to the United States district attorney as prescribed [by statute]." A further clause of Regulation 5 is as follows: "Any health, food, or drug officer or agent of any State, Territory, or the District of Columbia who shall obtain satisfactory evidence of any violation of the Food and Drugs Act, June 30, 1906, as provided in section five thereof, shall first submit the same to the Secretary of Agriculture, in order that the latter may cause notice to be given to the guarantor or to the party from whom the sample was obtained." This hearing is a very important matter for the manufacturer or seller. Full privilege is given him to show that the analysis or the result of examination is erroneous. This rule declares that the hearings "shall be private." This is for the purpose of preventing injury to the reputation of the article analyzed or examined if it should be found that the analysis or examination was erroneous. This rule also provides that the hearings shall be "confined to questions of fact." But this does not prohibit arguments to show whether or not the facts found come within the provisions of the statute, as to the meaning and intent of the provisions of the Act alleged to have been violated, particularly in those provisions where it is found, as applied to facts, they are not clear. No action is taken by the Secretary of Agriculture until the dealer or manufacturer has been notified and afforded a hearing before the Board of Food and Drug Inspection. But the preliminary hearing in each case may be held before the chief of the laboratory making the examination. In case of an adverse decision the recommendation of each chief, together with a digest of the testimony, must be submitted to such board for final action. Instead of appearing in person or by attorney, the interested parties may submit a brief to the board, stating their side of the case. If the results of the inspection and examination indicate that

the law has not been violated, or if it is believed by the department that a prosecution is unwarranted because of irregularity of sample, or for other reason, the dealer is notified that no further action will be taken with reference to that sample. No information is given in any case by an inspector or branch laboratory of the Bureau of Chemistry regarding the report of an inspection of a factory or the result of an analysis. No statement is made at any time regarding the analysis of a sample that is found to be in accordance with the law. No certificate of analysis is given, and no report given out other than the notice of a violation of the law.¹

¹ F. I. D. 69.

"You will see by the testimony in this case, that in each of these cases a government officer went to the place of business of the parties named and bought from them bottles containing this mixture, and he sent them to the laboratory—one to the Boston and the other to the Chicago laboratory, all passed upon by the government authorities and by them found to be adulterated. Then what follows? The government does not put a defendant to trial because of that inquiry alone, but it goes further and says. If that be found to be so from the examinations made of this product (and you will remember that the officers of the government who bought these articles, testified here that they sent two bottles to one place, two bottles to another place, and the remaining two bottles were left with the person from whom they were taken), as shown in those bottles, that they had been adulterated, and that they had been misbranded. Then they were required to go further after that was

ascertained. 'Finding that they were adulterated or misbranded, within the meaning of the Act, the Secretary of Agriculture shall cause notice thereof to be given to the party from whom such samples were obtained.' So this defendant was notified by the Secretary of Agriculture that those articles had been bought and that they had been found to be adulterated; but before authorizing any action to be taken by the district attorney, a hearing was had, at which the defendant was authorized to appear, and after that hearing (the Department being still satisfied, from the hearing, that the articles had been adulterated or misbranded), it became the duty of the Secretary under this Act of Congress, to transmit to the district attorney instructions to begin the proceedings, together with a copy of the analysis made at the time of the examination." After quoting those parts of the statute defining adulteration and misbranding, the court proceeds: "So you see what the purpose of Congress was, that no one

§ 502. Seizure of Adulterated or Misbranded Articles.

There can be no seizure of the adulterated or misbranded articles before the information or libel for their confiscation is filed. Rule 23 rather than rule 22 of the Proceedings in Admiralty controls in such instances.¹ Of course, seizure is not necessary to give the District Court jurisdiction.² But after information filed the process may be issued and the articles seized.³ A private person can not make the seizure provided for by the statute.⁴ "As to adulterated articles, it is a misdemeanor (1) to ship from one State to another; (2) to receive and deliver, or offer to deliver the same for pay, in unbroken packages. Such articles are liable to seizure and forfeiture under section ten: (1) when in the course of being transported from State to State; (2) when, having been transported, they remain (a) unloaded, or (b) unsold, or (c) in the original packages."⁵

who is desirous of knowing what the law is in that regard may make any mistake about it. The law requires the manufacturer to be honest in his statement of the contents of the package; it requires him to be honest in stating the truth upon the labels put upon it. That is all there is to the Act. That is what the Act is intended to accomplish, and which, if properly enforced, in my judgment, will accomplish.

"It is the duty of you [as jurors] and this court to obey the law and to enforce it; to enforce this statute as you would enforce every other statute. But it is not out of place for me to say here, that in the judgment of the court, no Act of Congress has been passed in recent years of more importance than this one.

"In dealing with foodstuffs, the seller should, and ought to know, what he is selling, and, on the other hand, the buyer should know what he is buying.

"This statute is not to be evaded by a mere subterfuge. It is to be enforced according to its letter and its spirit, and when that is done no one suffers by it." *United States v. Edward Westen Tea & Spice Co.*

Notice of Judgment 194.

¹ *United States v. George Sproul & Co.*, 185 Fed. 405; *United States v. Two Barrels of Desiccated Eggs*, 185 Fed. 302.

² *Ibid.*

³ *United States v. Two Barrels of Eggs*, 185 Fed. 302.

⁵ *United States v. Five Boxes of Assafoetida*, 181 Fed. 561.

§ 503. Bond for Release of Articles Seized.

In a proviso to section ten provisions are made for the release of the articles seized by the government. It is as follows:

"Upon the payment of the costs of such libel proceedings and the execution and delivery of a good and sufficient bond to the effect that such articles shall not be sold or otherwise disposed of contrary to the provisions of this Act, or the laws of any State, Territory, District, or insular possession, the court may by order direct that such articles be delivered to the owner thereof."¹

Where adulterated foods or drugs have been imported, and they have for that reason been refused admission by the Secretary of the Treasury, said Secretary may deliver them to the assignee under section eleven pending their examination by and the decision of the Secretary of Agriculture, "on execution of a penal bond for the amount of the full invoice value of such goods, together with the duty thereon." On a "refusal to return such goods for any cause to the custody of the Secretary of the Treasury, when demanded, for the purpose of excluding them from the country, or for any other purpose, said consignee" forfeits "the full amount of the bond." Regulation 35 covers the question of the bond.

§ 504. Publication of Result of Examination or Proceedings in Court—Food Inspection Decisions.

Where the Secretary of Agriculture has certified to the District Attorney that he has found certain foods or drugs to be adulterated or improperly branded, and that officer has brought proceedings in court and obtained a judgment to that effect, section four provides that "notice shall be given by publication in such manner as may be prescribed by the rules and regulations" adopted for that purpose. Regulation 4 provides that: "(a) When a judgment of the court shall have been rendered there may be a publication of the findings of the examiner or analyst, together with the findings of the

¹ N. J. 1016; N. J. 1017.

court. (b) This publication may be made in the form of circulars, notices, or bulletins, as the Secretary of Agriculture may direct, not less than thirty days after judgment. (c) If an appeal be taken from the judgment of the court before such publication, notice of the appeal shall accompany the publication." This statute and this regulation only contemplate the publication of the result of those instances where the district attorney has been officially notified of the adulteration or misbranding of an article of food or drugs, and pursuant to such notice has brought suit and obtained a judgment of the court that it was adulterated or misbranded. It does not apply to those instances where the district attorney upon his own initiative brings an action to have articles of food or drugs declared forfeited, but the practice is to publish the judgment in such instances if it results in a judgment of forfeiture. A notice of this kind is called "Notice of Judgment," and over one thousand of them have been published. In some of them appear opinions of the court; in others, where no opinion has been given, the mere result, preceded by a statement of the matter in issue, accompanied by a copy of the decree, is published. The object of publishing these notices is to give wide publicity that the defendant has been guilty of putting on the market adulterated or misbranded food or drugs, so that purchasers may be put on their guard. If judgment has resulted against the prosecution, no notice of it is given, and that is manifestly just, so as not to cast any suspicion upon the article of food or drugs it was charged was adulterated. The Board of Food and Drug Inspection give out many opinions, which are approved by the Secretary of Agriculture and published by the Department of Agriculture, relative to the Food and Drugs Act. Many of these are in answer to inquiries, and now amount to over one hundred. In a circular letter the Secretary of Agriculture has explained these decisions and the attitude of the Department toward them as follows: "Many letters have reached the Department asking for action on very important questions connected with the Food and Drugs Act which require much study to secure all the facts

necessary to the rendering of a just decision. The following general statement shows the attitude of the Department on questions of this kind: All manufacturers and dealers have copies of the law and regulations, or can secure them and study them carefully. Each manufacturer and dealer should conduct his business as nearly as possible in harmony with the law as he interprets it. When each particular problem involved reaches a solution in this Department, it is hoped it will be found that the manufacturers and others have come also to a similar decision in the matter. Public notice will be given of each decision as it is issued, that the manufacturers and dealers may be informed, and be able at once to place themselves in line with the decisions of the Department. In this way it is hoped that all injustice will be avoided in the execution of the law and every one be given an opportunity to put himself right and to have due notice of decisions which may be made. This Department will use every endeavor to reach prompt decisions, but must take time to collect the facts and subject them to a proper study; otherwise the decisions would not have the value which should attach to them in important matters affecting the execution of the law."¹ In another instance it was said: "The opinions or decisions of this Department do not add anything to the rules and regulations nor take anything away from them. They, therefore, are not to be considered in the light of rules and regulations. On the other hand, the decisions and opinions referred to express the attitude of this Department in relation to the interpretation of the law and the rules and regulations, and they are published for the information of the officials of the Department who may be charged with the execution of the law, and especially to acquaint manufacturers, jobbers and dealers with the attitude of this Department in these matters. They are, therefore, issued more in an advisory than a mandatory spirit. It is clear that if the manufacturers, jobbers and dealers interpret the rules and regulations in the same manner as they are interpreted by this De-

¹ F. I. D. 49.

partment, and follow that interpretation in their business transactions, no prosecutions will lie against them. It needs no argument to show that the Secretary of Agriculture must himself come to a decision in every case before a prosecution can be initiated, since it is on his report that the district attorney is to begin a prosecution for the enforcement of the provisions of the Act.² Insofar as it is advisable that the opinions of this Department respecting the questions which arise may be published. It may often occur that the opinion of this Department is not that of the manufacturer, jobber or dealer. In this case there is no obligation resting upon the manufacturer, jobber or dealer to follow the line of procedure marked out or indicated by the opinion of this Department. Each one is entitled to his own opinion and interpretation, and to assume the responsibility of acting in harmony therewith. It may be proper to add that in reaching opinions and decisions on these cases the Department keeps constantly in view the two great purposes of the Food and Drugs Act, namely, to prevent misbranding and to prohibit adulteration. From the tenor of the correspondence received at this Department and from the oral hearings which have been held, it is evident that an overwhelming majority of the manufacturers, jobbers and dealers of this country are determined to do their utmost to conform to the provisions of the Act, to support it in every particular, and to accede to the opinions of this Department respecting its construction. It is hoped, therefore, that the publication of the opinions and decisions of the Department will lead to the avoidance of litigation which might arise due to decisions which may be reached by this Department indicating violations of the Act, violations which would not have occurred had the opinions and decisions of the Department been brought to the attention of the offender.”³

² As we have seen, this is not true of an action brought to secure a condemnation of adulterated or misbranded goods or drugs. United

States v. Fifty Barrels of Whisky, 165 Fed. 966.

³ F. I. D. 44.

§ 505. Appeal to the Secretary of Agriculture.

In an instance of adulterated food or drugs, and a finding that such is the fact, an appeal lies. The regulation on this question is as follows: "All applications for relief from decisions arising under the execution of the law should be addressed to the Secretary of Agriculture, and all vouchers or accounts for remuneration for samples should be filed with the Chief of the Inspection Laboratory, who shall forward the same, with his recommendation, to the Department of Agriculture for action."¹

§ 506. Legality of Referee Board.

The Secretary of Agriculture appointed five scientific consulting experts to give necessary advice upon questions arising in the enforcement of the Food and Drugs Act, June 30, 1906. This appointment was made February 20, 1908. A question having been raised concerning the validity of this appointment and the right to pay the appointees for their services out of the public treasury, the question was submitted to the Attorney-General, who not only held that the appointment was legal, but also that the salaries of these experts could be paid out of the public treasury.¹

§ 507. Injoining Food Officer in the Performance of his Duties.

One having no interest in the subject matter affected can not enjoin a food or drug officer in the performance of his duties. This is well illustrated by one of the several bleached flour cases.¹ The Secretary of Agriculture had decided that bleached flour was adulterated, and had issued a circular to that effect. This circular recited that flour bleached by a certain process was adulterated. The patentee of machinery on which this process was practiced and used sought by mandamus to compel him to withdraw this circular and to cancel his decision on the ground that it contained false statements, and that these false statements were ruining the sale of his machinery. He also sought to compel the withdrawal

¹ Regulation 37.

¹ F. I. D. 100.

¹ F. I. D. 107.

of the Secretary's requests to various district attorneys to begin proceedings against those manufacturing bleached flour. But the court refused the writ on the ground that the applicant for it—the patentee of the machinery—had no interest in the controversy, though the sale of his machinery was incidentally affected thereby.² But where the same plaintiff brought suit to enjoin a district attorney bringing an action to secure the destruction of bleached flour manufactured and owned by it, on the ground that the Food and Drugs Act of 1906 was unconstitutional, the court held that the action was properly brought.³

§ 508. Proceedings in Court.

If analyzed food or drugs be found adulterated, or be found misbranded upon examination, as the Food and Drugs Act provides for such analysis or examination, then the Secretary of Agriculture "shall at once certify the facts to the proper United States district attorney, with a copy of the results of the analysis or the examination, under the oath of such analyst or examining officer."^{2a} In the fifth section it is provided "that it shall be the duty of each district attorney to whom the Secretary of Agriculture shall report any violation of this Act, or to whom any health or food or drug officer or agent of any State, Territory or the District of Columbia shall present satisfactory evidence of any such violation, to cause appropriate proceedings to be commenced in the proper courts of the United States, without delay, for the enforcement of the penalties as in such case are as herein provided." It has been decided that the district attorney can not maintain an action to recover penalties or a forfeiture of the adulterated article for a violation of the statute unless the Secretary of Agriculture should upon a statutory notice and hearing first report to him a violation of the statute, when the proceedings are based upon such report.

² United States ex rel. Alsop Process Co. v. Wilson.

Notice of Judgment 498.

³ Shawnee Milling Co. v. Temple, 179 Fed. 517. Notice of Judgment 497.

^{2a} The fact of a violation of the law and not the evidence of the violation need only be certified. United States v. Twenty Cases of Grape Juice, 189 Fed. 331.

The notice and hearing before the Secretary is a condition precedent when the proceedings are based upon such report;^a and it has been decided in case of proceedings for a forfeiture of adulterated or mislabeled articles, that he may proceed upon his own motion, without waiting for an official report showing that the statute has been violated in that regard.¹ The statute does not bring the proceedings to have a forfeiture declared of adulterated or misbranded goods within the admiralty or maritime jurisdiction of the Federal Courts. Jurisdiction in such an instance is conferred by the Act itself.² A seizure of the adulterated or misbranded food or drugs is not necessary to confer jurisdiction upon the court, and it is not necessary before filing the libel and beginning the action.³ Under section ten the District Court retains jurisdiction so long as the food or drugs remains at the point of destination in the original package in an instance of interstate transportation; but if the package be broken before proceedings are instituted, then the court can not obtain jurisdiction,⁴ unless, possibly, the article transported "re-

^a *United States v. Twenty Cases of Grape Juice*, 189 Fed. 331. The preliminary notice and hearing "applies only when the district attorney acts upon the report of the Secretary of Agriculture. It is not required when he acts upon evidence furnished by any State health officers and undoubtedly would not be required in proceedings taken at his own initiative."

¹ *United States v. Fifty Barrels of Whisky*, 165 Fed. 966, the court saying: "Such seizures are not unusual, and it is plain that, if the harshness were conceded, it would not justify the court in reading into the law a limitation which it does not contain. The Act provides two different proceedings to enforce its provisions. One is by criminal proceedings in personam, the other is proceedings in rem, by seizure of the offending thing it-

self, and forfeiture if found to be violative of the law. In this latter case there is no provision for a preliminary examination."

This decision was approved in *United States v. Knowlton Danderine Company*, 170 Fed. 449; affirmed 175 Fed. 1022, 99 C. C. A. 667. Notice of Judgment 284; *United States v. Sixty-five Cases*, 170 Fed. 449; *United States v. P. Pastene & Co*; N. J. 648; *United States v. George Sproul & Co.*, 185 Fed. 405; *United States v. Two Barrels of Eggs*, 185 Fed. 302.

² *United States v. Two Barrels of Desiccated Eggs*, 185 Fed. 302.

³ *United States v. George Sproul & Co.*, 185 Fed. 405; *United States v. Two Barrels of Eggs*, 185 Fed. 302.

⁴ *United States v. Two Barrels of Desiccated Eggs*, 185 Fed. 302.

mains unloaded" or "unsold."⁵ If the article "be imported from a foreign country for sale, or if it is intended for export to a foreign country," then the breaking of the original package would not defeat the power of the court to proceed against it to declare a forfeiture.⁶

§ 509. Proceedings to Secure a Forfeiture—Libel.

Section ten of the Food and Drugs Act provides: "That any article of food, drug, or liquor that is adulterated or misbranded within the meaning of this Act, and is being transported from one State, Territory, District, or insular possession to another for sale, or, having been transported, remains unloaded, unsold, or in original unbroken packages, or if it be sold or offered for sale in the District of Columbia or the Territories, or insular possessions of the United States, or if it be imported from a foreign country for sale, or if it is intended for export to a foreign country, shall be liable to be proceeded against in any District Court of the United States within the district where the same is found, and seized for confiscation by a process of libel for condemnation. And if such article is condemned as being adulterated or misbranded, or of a poisonous or deleterious character, within the meaning of this Act, the same shall be disposed of by destruction or sale, as the said court may direct, and the proceeds thereof, if sold, less the legal costs and charges, shall be paid into the Treasury of the United States, but such goods shall not be sold in any jurisdiction contrary to the provisions of this Act or the laws of that jurisdiction." It also provides that "the proceedings of such libel cases shall conform, as near as may be, to the proceedings in admiralty, except that either party may demand trial by jury of any issue of fact joined in any such case, and all such proceedings shall be at the suit of and in the name of the United States." In a proceeding for a forfeiture of the adulterated or misbranded articles of food or drugs, it is not necessary that the

⁵ See Section 10 of Act.

⁶ The court under Rev. St., §563, subd. 8, proceeds as a court of commonwealth jurisdiction on a

trial by jury, and not as a court of admiralty. *United States v. George Sproul & Co.*, 185 Fed. 405.

district attorney should be first notified by some official of the violation of the statute in that respect. He can proceed upon his own initiative.^a "The Act provides two different proceedings to enforce its provisions. One is criminal proceedings in personam, the other is a proceeding in rem, by seizure of the offending thing itself, and forfeiture, if found to be violative of the law. In the latter case there is no provision for a preliminary examination."¹ But while it is not necessary to aver that proceedings have been held before the Secretary of Agriculture and the matter certified to the district attorney, yet if the evidence discloses that the proceedings are under section four rather than section five of the statute, then there can be no conviction under such a libel. In order to convict under section four, it is necessary to aver that a sample had been analyzed by the Secretary of Agriculture, resulting in a finding that the food or drug was adulterated, and that the matter had been so certified to the district attorney.² Strictness is required in making the charge. Thus, a libel for the condemnation of catsup, in which it is alleged it was misbranded, in that it was made in part from tomato pulp screened from peelings and cores, as the "offal" of tomato canning factories, and not from choice ripe tomatoes, as stated in the labels, does not charge a violation of clause six of section seven relating to preparations consisting in whole or in part of filthy, decomposed or putrid animal or vegetable substance; the words "as the offal of tomato canning factories" being of no exact signification, and the word "offal" not being the equivalent of a charge that the tomato pulp was filthy, decomposed or putrid vegetable substance.³ Where the charge is misbranding, it is essential that the libel should set forth the branding and facts incon-

^a See § 508. *United States v. Twenty Cases of Grape Juice*, 189 Fed. 331.

¹ *United States v. Fifty Barrels of Whisky*, 165 Fed. 966. Approved in *United States v. Knowlton Danderine Co.*, 170 Fed. 449; affirmed 175 Fed. 1022, 99 C. C. A. 667. Notice of Judgment 284.

² *United States v. Morgan*, 181 Fed. 587; *United States v. Seventy-four Cases of Grapejuice*. N. J. 450.

³ *United States v. Six Hundred and Fifty Cases*, 166 Fed. 773; N. J. 301.

sistent therewith, and, if there be indefiniteness in the statement, it must be removed by proof. Thus, where a libel was for misbranding catsup, alleging that the label stated the catsup was made from choice ripe tomatoes, when in fact it was made in part from tomato pulp screened from peelings and cores or the offal of tomato canning factories, and not from choice ripe tomatoes, the court refused to assume, from the fact that the peelings and cores were not used in a tomato canning factory, that they were not suitable for making tomato catsup.⁴ In one case, where the information contained three counts, the court used the following language, which shows how strict the courts are: "The first count charged that the Company misbranded a fluid it made and sold by labeling it 'Flavor of Lemon and Citral.'—'A Pure Flavor,' when in fact this fluid 'did not then and there contain any measurable and appreciable quantity of lemon oil, which said lemon oil in measurable and appreciable quantity is a necessary and essential ingredient of a pure lemon flavor.' But the fluid was not marked or labeled a pure lemon flavor and the count contained no averment that lemon oil in measurable quantities was an essential ingredient of a pure flavor of lemon and citral and hence it charged no offense.

"The second count charged a misbranding of the same fluid which the pleading declared 'was a fluid substance purporting and represented to be lemon and citral flavor,' in that the Company labeled it 'A Pure Flavor,' 'which said marking and labeling' the information avers, 'was intended to convey to the purchasing public the meaning that said article of food was a pure flavor or extract derived from the lemon fruit containing, among other things, the oil of lemon and citral derived from such fruit, when in truth and in fact said article of food contained no pure lemon flavor, in that it contained no measurable amount of lemon oil and did contain an added substance not derived from the lemon fruit, to wit, citral, and when in truth and in fact pure fruit flavors are derived either from the fruit directly or by the solution of the essential oil

⁴ *United States v. Six Hundred and Fifty Cases*, 166 Fed. 773; *United States v. Buffalo Cold Storage Co.*, 179 Fed. 865; N. J. 482.

of the fruit through the medium of alcohol.' But the fluid according to this count was represented to be a lemon and citral flavor and was branded a pure flavor. The plain and incontrovertible meaning of such a brand was not that the fluid was a pure flavor of lemon, but that it was a pure flavor of lemon and citral, and the averment that the Company intended that the purchasing public should interpret the label to mean that which it clearly did not indicate and which the information does not aver, that any purchaser even understood it to mean, could not constitute a misbranding. In reality this charge is that the fluid contained no pure lemon flavor but contained an added substance not derived from the lemon fruit, to wit, citral, and that it was branded a pure flavor of lemon and citral. This was a true and not a false branding. If the Company had branded the fluid a pure flavor of lemon it might have violated the law, because it also had the flavor of citral, and if the pleader had averred that the oil of lemon in appreciable quantities was an essential ingredient of a pure flavor of lemon and citral and that this fluid contained none of it the count might have stated an offense. But no such averment was made and the second count failed to state facts sufficient to constitute a violation of the law.

"The third count of the information charged that the Company adulterated and misbranded this fluid which purported and was represented to be lemon and citral flavor by marking and labeling it 'Flavor of Lemon and Citral'—'A Pure Flavor,' by which statements the count declares the Company 'designed and intended the public to understand and believe that said food product was a pure flavor and extract of lemon, when these marks and labels 'were false and misleading in this—that said article, so manufactured, prepared and shipped . . . was an imitation of the true lemon flavor commonly called lemon extract so commonly used and employed in the preparation of food products, and of far less value, strength and efficacy than said true lemon flavor.' But an innuendo may not change, add to or enlarge the sense of expressions beyond their usual acceptance and meaning. It may serve as an explanation but not as a substitute. The usual accepta-

tion and meaning of the label 'Flavor of Lemon and Citral'—'A Pure Flavor' distinctly negatives the idea that it describes a pure flavor and extract of lemon and the expression 'a pure flavor and extract of lemon' can not be substituted by pleading or proof for that which the defendant actually used and then the defendant be convicted upon the substituted label which it never conceived. Nor may an averment that a defendant intended that a label should be understood by the public to mean the opposite of its ordinary and accepted interpretation make its use a misbranding or constitute a violation of the law. The truth is that when the averments of this count are read and construed together they clearly disclose the facts that the fluid made and sold by the defendant was not a pure lemon extract or a pure lemon flavor, or any imitation thereof, that the defendant never placed any label or mark upon it which indicated that it was or which could mislead a purchaser, but that by its declaration through the label that it was a flavor of lemon and citral it clearly notified all purchasers that the fluid was neither a pure lemon extract nor a pure lemon flavor. There is no averment of any facts which disclose any adulteration of this flavor of lemon and citral and the averment fails to state sufficient facts to constitute a violation of the law. The demurrer to the information should have been sustained."¹ So where, in a libel to forfeit a certain syrup, it was stated that the boxes and bottles did not contain a blend of maple syrup, as stated on the labels, but alleged that the contents consisted of a mixture or compound of refined cane sugar flavored with an extract of maple wood, the negation of a blend of maple syrup was held to be a conclusion of the pleader which was not admitted by the demurrer.⁵ On a charge of mislabeling food so as to be misleading, the burden is upon the government to prove that the label contained a statement which was substantially false and misleading.⁶ The proceedings are reviewable only upon a writ of error.⁷ A fail-

¹ United States v. Nave-McCord
Mercantile Co., N. J. 895.

⁵ United States v. Sixty-eight
Cases, 172 Fed. 781.

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⁶ United States v. Six Hundred
and Fifty Cases, 166 Fed. 773, N. J.
301.

⁷ United States v. Seven Hundred

ure to verify the libel is not cause for demurrer.⁸ A failure to aver the date of the shipment is not fatal.⁹ If it be doubtful whether the accused had violated the Pure Food Law, application to file an information will be denied, pending notice of an adverse determination by the Agricultural Department on hearing and an opportunity by the accused to change the labels.¹⁰ Admiralty Rule 23, in a proceeding to forfeit adulterated articles, must be followed, and it be averred that "the property is within the district" where the proceedings are brought. Rule 22 of Proceedings in Admiralty does not control such actions.¹¹ The proceedings may be instituted by the filing of an information by the district attorney, for the offense prescribed by section two of the statute is not an infamous one requiring proceedings by indictment.¹² Material shipped from one State to another to be used solely by the shippers as raw material in the production of a finished product, and not for sale, may be seized and condemned under section ten, if adulterated or unfit for food.¹³

and Seventy-nine Cases, 174 Fed. 325.

⁸ *United States v. Two Barrels of Desiccated Eggs*, 185 Fed. 302.

⁹ *United States v. Two Barrels of Desiccated Eggs*, 185 Fed. 302.

¹⁰ *United States v. Schurmann*, 177 Fed. 581.

¹¹ *United States v. George Sproul & Co.*, 185 Fed. 405.

Upon proceedings to forfeit food or drugs a trial by jury can be demanded. *United States v. George Sproul & Co.*, 185 Fed. 405.

¹² *United States v. J. Lindsay Wells Co.*, 186 Fed. 248; *United States v. George Sproul & Co.*, 185 Fed. 405; *United States v. Two Barrels of Desiccated Eggs*, 185 Fed. 302.

¹³ *United States v. Two Barrels of Eggs*, 185 Fed. 302. *United States v. 300 Cans of Frozen Eggs*,

189 Fed. 351. When not necessary to aver article was transported "for sale" or to negative that it was intended for other than good uses.

In *United States v. St. Louis Coffee & Spice Mills*, 189 Fed. 191, Judge Dyer held that the Secretary of Agriculture could not establish a standard for foods and drugs; while in *United States v. Frank*, 189 Fed. 195, Judge Hollister held he could and criticized Judge Dyer's opinion. Under the former decision, in a prosecution under Section 2 it was necessary to charge the manner of adulteration as defined in Section 7, or misbranding as defined in Section 8. Under the latter decision a charge that the defendant shipped in interstate commerce an article of food labeled "Extract of Lemon" in

§ 510. When Forfeiture Takes Place.

A violation of the Pure Food and Drugs Act does not ipso facto work a forfeiture of the adulterated or misbranded article. That only takes place when the decree of forfeiture is entered.¹

§ 511. A Misbranding Corrected before Forfeiture Proceedings Begun.

To sustain proceedings for a forfeiture of an article of food or a drug because it is misbranded or adulterated, it must have been misbranded or adulterated at the time such forfeiture proceedings were begun; so that, if a misbranded or adulterated article is transported from one State to another, but before proceedings for its forfeiture are actually begun it is properly labeled so as to show its exact condition, such proceedings must fail. In one case five boxes of assafoetida were transported from New York to Pennsylvania, and the labels on them did not show that it was adulterated. Upon receipt the defendant consignee opened them, and, finding that the contents was below the standard required by the United States Pharmacopoeia, he immediately relabeled them so as to show the exact state of the drug. The court in pass-

which a dilute solution of alcohol and water was substituted in part for the terpeneless lemon extract, so that it contained no more than five-tenths percent of citral derived from the oil of lemon, whereas, as recognized in the trade generally and by the standard of purity established by the Secretary of Agriculture in Circular No. 19, issued by authority of the Act of March 3, 1903, such extract should contain at least two percent by weight of such citral, was held to state facts to sustain a charge both of adulteration and misbranding.

¹ United States v. George Sprou. & Co., 185 Fed. 405; United States

v. Two Barrels of Desiccated Eggs, 185 Fed. 302. In United States v. Five Boxes of Assafoetida, 181 Fed. 561, a different view seems to have been entertained, the court saying: "Under the common law, the offender's right was not divested upon forfeiture proceedings until conviction, but this doctrine never was applied to seizures and forfeitures created by statute in rem for violations of the revenue law of the government. The thing there is primarily considered; the offender, or rather the offense, was attached primarily to the thing, and this whether the offense was *malum prohibitum* or *malum in se*."

ing on the case said: "The third defense interposed by the claimants, that the proper labeling of the packages before seizure relieved them from liability to forfeiture under the terms of section ten, must be regarded as more substantial [than the other defenses] and as a good ground for dismissing the libel. Under this in rem forfeiture procedure under section ten the article or drug itself is the thing inculpated, and it must be adulterated or misbranded within the meaning of the Act at the time the government seizes it. It was not adulterated when seized, but branded as required by law. It is not sufficient that it was adulterated when it was being transported from one State to another and liable to forfeiture at that time. It was not then seized, and there is no language of the Act to authorize seizure for any past offending condition of the drug. A drug that 'is' adulterated or misbranded (is the language used) and 'is' being transported from one State to another for sale shall be liable, etc. A drug which, 'having been transported, remains unloaded, unsold, or in original unbroken packages'—shall it be liable to forfeiture for some previous irregularity, if not adulterated or misbranded at the time of seizure? It is not so stated in the Act. There is no seizure of a drug that 'was' adulterated authorized. Having been transported, and remaining unloaded, unsold, or in the original unbroken packages, it can only be forfeited when it 'is' adulterated and misbranded when seized. These boxes of assafoetida, when seized by the government, were not adulterated within the meaning of the Act. It is true they 'had been transported' (from one State to another for sale) and 'remained in the original unbroken packages at the time the government seized them,' but they were not adulterated. Under section seven this assafoetida was adulterated only in case its standard of strength, quality and purity was not plainly stamped upon the containers, but if so marked it was not adulterated. The liability to forfeiture of the drug, therefore, would depend upon whether or not the containers were so marked at the time the government seized them. They were so marked, and not liable to seizure. The containers having been branded according to

the requirements of the Act at the time of seizure, there is no valid ground for forfeiture, and the libel case is dismissed.”¹ But it must be observed that the offense under section two of the statute was not in any way palliated by the correction of the labels, for at the time it was brought into the State of Pennsylvania the contents of the boxes was adulterated and the boxes were misbranded, and thereby an offense was committed under that section, if the consignee delivered their contents “in original packages, for pay or otherwise, or offer to deliver to any other person” the articles “so adulterated or misbranded.”

§ 512. No Intent to Violate Statute.

Repeated statements have been made in this work that an intent to violate the statute is not necessary in order to incur the infliction of a penalty for the sale or keeping for sale adulterated or impure food or drugs. An act performed with no intent to violate a pure food statute is just as much a crime under this Federal Pure Food and Drugs Act of June 30, 1906, as if a criminal design to violate it was intended and entertained at the time of its performance. This rule extends to sales or other acts by servants. So it extends to cases of forfeiture of impure or adulterated foods and drugs under this Act. In speaking of this statute and this question under its provisions, it has been said: “When the thing is inculpatated under an in rem statutory provision it may be forfeited, although the act which caused the forfeiture was not authorized or done by or with the consent or knowledge of the owner.”¹

§ 513. Section Two and Section Ten not Interdependent.

It is not necessary that a criminal prosecution must be maintainable under section two of the Act in order to proceed under section ten to secure a forfeiture, for there may

¹ *United States v. Five Boxes of Assafoetida*, 181 Fed. 561, citing *Assafoetida*, 181 Fed. 561. *Dobbins v. United States*, 96 U. S.

¹ *United States v. Five Boxes of* 395, 24 L. Ed. 637.

be a forfeiture incurred even though the provisions of section two be not violated. "Section two and section ten are not at all interdependent. The misdemeanor denounced in section two is entirely distinct and independent of the grounds of forfeiture in section ten. Congress has clearly defined in section two what acts or omissions shall constitute a misdemeanor with regard to adulterated or misbranded articles of food or drug, and, in order to ascertain whether or not any person is guilty of having violated the provisions of this section, it is not at all necessary to refer to section two, as section two, as to what shall be deemed a misdemeanor, is complete within itself. As to adulterated articles, it is a misdemeanor (1) to ship from one State to another; (2) to receive and deliver, or offer to deliver, the same for pay in unbroken packages. Such articles are liable to seizure and forfeiture under section ten: (1) When in the course of being transported from State to State; (2) when, having been transported, they remain (a) unloaded, or (b) unsold, or (c) in the original packages. It will be seen that section ten fully and completely defines the conditions under which such articles are liable to seizure and forfeiture. There is no reference to or dependence upon the misdemeanor defined in section two, and it is unimportant, as far as the forfeiture proceedings are concerned, whether or not any person could be convicted under section two. Congress has defined fully in section ten when and under what circumstances the article of food or drug shall be forfeited, without reference to the guilt of the owner under section two."¹

§ 514. Jury Trial.

In a proceeding to libel and condemn adulterated food, both the claimant and the prosecution are entitled to a jury trial under section ten of the Food and Drugs Act, and this means a trial by jury according to the established practice in courts of common law.¹

¹ United States v. Five Boxes of Assafoetida, 181 Fed. 561.

¹ United States v. Seven Hundred and Seventy-nine Cases of Mo-

§ 515. Costs in Proceedings in Rem, Assessing against the Person.

Costs in personam may be assessed against the claimant in the proceedings in rem under the Food and Drugs Act of 1906, to confiscate adulterated articles of food, the subject of interstate commerce, even if the principles of the admiralty law are made applicable by the provisions of that statute, to the effect that the proceedings shall conform as near as may be to the proceedings in admiralty.¹

§ 516. Punishment—Infamous Crime—Prosecution by Information.

“This is an action brought by the United States against J Lindsay Wells Company under section 2 of the Act of June 30, 1906, on the charge of shipping from Memphis, in the State of Tennessee, to Attica, in the State of Indiana, thirty tons of cotton-seed meal, which article of food at Memphis, Tennessee, was adulterated.

“The suit is brought upon information by the United States district attorney.

“The defendants move to quash the information, upon the ground that the same violates that part of the Fifth Amendment of the Constitution of the United States, which provides that no person shall be held to answer for a capital or otherwise infamous crime, unless upon presentment or indictment of a grand jury.

“The question presented is, whether or not the offense alleged to have been committed by the defendant is a capital or otherwise infamous crime.

“It is, of course, not a capital crime, and if it is otherwise

lasses, N. J. 270; *United States v. George Sproul & Co.*, 185 Fed. 405; *United States v. Two Barrels of Eggs*, 185 Fed. 302; *Elliott v. Toepfner*, 187 U. S. 327, 23 Sup. Ct. 133, 47 L. Ed. 200; *Knickerbocker Insurance Company v. Comstock*, 16 Wall. 258, 21 L. Ed. 493;

Parsons v. Bedford, 3 Pet. 433, 7 L. Ed. 732; *Bower v. Holzworth*, 138 Fed. 28; *Duncan v. Landis*, 106 Fed. 839.

¹*Hipolite Egg Co. v. United States*, 220 U. S. 49, 31 Sup. Ct. 364, 55 L. Ed. —.

an infamous crime, the motion to quash must be allowed, since, under the authorities, it is well settled that a prosecution can be maintained upon information made by the district attorney for such a crime.¹

"As I understand the authorities, they hold that any offense, the punishment for which may be imprisonment in the penitentiary, with or without hard labor, is an infamous crime.²

"On an examination of the Act under which this suit is instituted, I find that the punishment therefor is a fine not exceeding two hundred dollars for the first offense, and upon conviction for each subsequent offense, not exceeding three hundred dollars, or by imprisonment not exceeding one year, or both, in the discretion of the court.

"Under the authorities above cited, it is held that a defendant can not be imprisoned in the penitentiary, unless the time for which he is sentenced shall be more than one year. Under the Act of June 30, 1906, the imprisonment can not exceed one year. Therefore, the court has no power to sentence the defendant to imprisonment to the penitentiary, because that would be in excess of the maximum time which the court is authorized to imprison a party for such offense.

"As I understand the authorities, they hold in substance that where the court may imprison the accused for more than one year, the confinement must be in the penitentiary, and that fact, with or without labor, constitutes an infamous crime. Upon the other hand, where the period of imprisonment is for one year or less, the court must imprison in a county jail, and that would not be an infamous crime.

"If the court has the power to imprison for more than one year, the crime is infamous. If for a year or less, it is not infamous.

"Under section 1022 of the Revised Statutes it is provided

¹ Citing *Ex parte Wilson*, 114 U. S. 417, 5 Sup. Ct. 935, 29 L. Ed. 89.

² Citing *Mackin v. United States*, 117 U. S. 348, 6 Sup. Ct. 777, 29 L. Ed. 909; *Parkinson v. United*

States, 121 U. S. 281, 7 Sup. Ct. 886, 30 L. Ed. 959; *In re Cleasen*, 140 U. S. 200, 11 Sup. Ct. 735, 35 L. Ed. 409.

that all crimes and offenses committed against the provisions of ch. 7, entitled 'Crimes,' which are not infamous, may be prosecuted either by indictment or by information filed by the district attorney.

"It appearing from the foregoing that the crime for which the defendant is charged is not infamous, I am of the opinion that this suit can be maintained upon the information filed, and the motion to quash will be disallowed."³

§ 517. Liability of Corporation and Corporate Officers.

In the Massachusetts statute it is held that the word "whoever," with regard to the sale of adulterated milk, includes a corporation.¹ Where corporate officers employ a general manager for their corporation, to operate the plant and sell its manufactured product, without restriction, they will be criminally liable for his acts in violation of the Pure Food Law, if they know or have good reasons to know he is doing so.²

³ Judge McCall, *United States v. J. Lindsay Wells*, 186 Fed. 248, N. J. 794.

¹ *Commonwealth v. Graustein & Co. (Mass.)*, 95 N. E. 97.

² *United States v. Mayfield*, 177 Fed. 765.

PART III

STATE AND ENGLISH STATUTES AND DECISIONS

CHAPTER X.

ANALYSIS OF FOOD.

SEC.	SEC.
518. Samples for analysis.	521. When certificate not evidence.
519. Analyst appointed by court.	522. Form of analyst's certificate under English statute.
520. Sample and certificate of analysis under English food and drugs statute—Statutory provision.	523. Decisions under English food and drugs statute.

§ 518. Samples for Analysis.

Statutes are in force in many States giving the inspectors power to take samples of milk offered for sale or sold, for analysis, and these statutes have been upheld as valid exercise of the State's police power.¹ We can here only give some of the results of the decisions in construing these statutes. A statute made the selling of adulterated milk a misdemeanor, and defined what should be deemed an adulteration. It provided that when a sample of milk had been taken by the Commissioners of Agriculture with a view of prosecuting the producer for selling adulterated milk, another sample should afterwards be taken of the mixed milk of the herd, and if this sample should contain no higher percentage of milk solids and fats than the sample taken from the creamery or other place, no action should lie against the producer. It

¹ Sections 37 and 38.

was held that the fact that the herd sample was no better than the other sample was a bar only to an action by the Commissioners for a penalty, and not to a criminal prosecution by other authorities for selling adulterated milk.² Where a statute required every milk dealer, on demand of an agent of the health department, to sell a sample of his milk sufficient for the purpose of analysis, it was held that a dealer was not guilty of a violation of its provisions because he refused to sell a half pint on demand of an inspector of the health office, putting his refusal on the ground that he did not sell milk in any quantity less than a pint, and then only in original bottles as received from the dairy, but offered to sell him a pint bottle of his milk. It was said that the statute required a reasonable sample to be sold, and under such circumstances a pint is such a sample.³ A mandatory injunction will not lie to compel the milk vendor to furnish samples of milk when the statute makes it an offense to refuse to furnish them.⁴ Where a statute requires the inspector to seal up and deliver to the milk dealer a part of the milk taken, or to his attorney in case complaint is made against the dealer, the defendant is entitled on the trial to have the jury told that the mere placing of a sealing wax upon the top of the cork, without extending it over the mouth of the bottle—without making it air-tight—was not a sealing within the meaning of the Act.⁵ Whether or not the addition of a few drops of carbolic acid to that part

² *People v. Beaman*, 102 N. Y. App. Div. 151, 92 N. Y. Supp. 295. See also *People v. Gilmor*, 73 N. Y. App. Div. 483, 77 N. Y. Supp. 273. This statute did not give the commissioners exclusive power to take samples of milk and institute prosecutions for the sale of adulterated milk, so as to deprive all other officers of the power formerly given them by statute to institute such proceedings. *People v. Beaman*, *supra*. As to the practice under

this statute, see *People v. Bailey*, 136 N. Y. App. Div. 130, 120 N. Y. Supp. 618; *People v. Terwilliger*, 59 N. Y. Misc. 617, 110 N. Y. Supp. 1034.

³ *District of Columbia v. Garrison*, 25 App. D. C. 563. See also *Weigand v. District of Columbia*, 22 App. D. C. 559.

⁴ *State v. Capitol City Dairy Co.*, 62 Ohio St. 123, 56 N. E. 651.

⁵ *Commonwealth v. Lockhardt*, 144 Mass. 132, 10 N. E. 511.

of the milk returned to the defendant affected the sample so as to constitute a failure to comply with the provisions of the statute requiring the inspector to furnish the dealer a sample of the milk taken is a question for the jury.⁶ Notwithstanding a statute requires the inspector to give the milk dealer a sealed sample of the milk taken, and excludes evidence of the analysis if it be not left with him, yet a failure to leave a sample, when the inspector "buys" a sample, and does not "take" it, without disclosing he is an inspector, yet evidence that the milk thus bought was below the legal standard may be shown by proof of an analysis showing such to be the fact.⁷ A statute prohibited the sale of adulterated or unwholesome milk, and provided for the taking of samples by State inspectors for analysis. The statute also required that when the milk was delivered by the producer for manufacture, sale or shipment, or from a milk vendor who produces the milk which he sells, and it is designed to prosecute such producer, a sample should be taken from the mixed milk of the herd of cows from which the milk claimed to have been adulterated was drawn. It was held that, since, in a prosecution of a milk vendor not a producer of the milk sold, no herd sample was required to be taken, evidence that no herd sample had been taken from the producer of the milk sold by the vendor was incompetent.⁸

⁶ *Commonwealth v. Spear*, 143 Mass. 172, 9 N. E. 632.

⁷ *Commonwealth v. Coleman*, 157 Mass. 460, 32 N. E. 662.

In an action to recover a penalty for selling or exposing for sale impure milk, evidence of the defendant that he tested the milk before sending it to customers is insufficient to sustain a judgment for the plaintiff. *People v. McDermott-Bunger Dairy Co.*, 38 N. Y. Misc. Rep. 365, 77 N. Y. Supp. 888.

⁸ *People v. Laesser*, 79 N. Y. App. Div. 384, 79 N. Y. Supp. 470.

A statute providing that no milk shall be sold as certified milk, unless it is conspicuously marked with the name of the "association" certifying it, is invalid if it fails to designate the association by which the certification is to be made. *People v. Briggs*, 193 N. Y. 457, 86 N. E. 522, reversing 121 N. Y. App. Div. 927, 106 N. Y. Supp. 1140.

The entire sample taken need not be analyzed. *Rolfe v. Thompson*, 2 Q. B. 196, 56 J. P. 425, 61 L. J. M. C. 184, 67 L. T. 295, 8 T. L. R. 644.

§ 519. Analyst Appointed by the Court.

In the prosecution of a defendant for selling adulterated food the court has a discretion to permit the defendant to have an analysis made of the product claimed to be adulterated; but a showing should be made of the necessity or propriety of granting the right, and the analysis, if ordered, should be under the supervision of the court, by a chemist appointed by it.¹ Inability should be shown to otherwise

¹ *Breckenridge v. State*, 3 Ohio v. *Breckenridge*, 7 Ohio N. P. 663, N. P. 313, 4 Ohio L. D. 389; *State* 5 Ohio S. & C. P. Dec. 546. make a defense than by analysis as to the ingredients of the article in question.²

§ 520. Samples and Certificate of Analysis Under English Food and Drugs Statute—Statutory Provision.

The English Sale of Food and Drugs Act of 1875¹ provides that "any purchaser" of an article of food or of a drug may have it analyzed by the analyst appointed for the district in which it is purchased, upon paying certain fees. This certificate is made sufficient evidence of the facts therein stated, unless the defendant shall require that the analyst shall be called as a witness, and the parts of the article retained by the person who purchased the article shall be produced.² If the official analyst's certificate shows that the article sold was adulterated, he may bring an action against the vendor to recover a penalty in the place where the article was actually delivered to the purchaser.³ So any medical officer of health, inspector of nuisances, or inspector of weights and measures, or any inspector of a market, or any police constable, "under the direction and at the cost of the local authority appointing such officer, inspector or constable, as charged with the execution" of this statute, "may procure any sample of food

² *State v. Breckenridge*, supra. It is said that the analysis should be conducted in the presence of the expert who made the analysis for the State.

¹ 38 and 39 Vict., ch. 63, § 12.

² 38 and 39 Vict., ch. 63, § 21.

³ 38 and 39 Vict., ch. 63, § 20.

or drugs, and if he suspect the same to have been sold to him contrary to any provision" of this statute, "shall submit the same to be analyzed by the analyst of the district or place for which he acts."⁴ This statute also provides as follows: "The person purchasing any article with the intention of submitting the same to analysis shall, after the purchase shall have been completed, forthwith notify the seller or his agent selling the article his intention to have the same analyzed by the public analyst, and shall offer to divide the article into three parts, to be then and there separated, and each part to be marked and sealed or fastened up in such manner as its nature will permit, and shall, if required to do so, deliver one of the parts to the seller or his agent. He shall afterwards retain one of the said parts for future comparison, and submit the third part, if he deems it right to have the article analyzed, to the analyst."⁵ Another section provides that: "If any such officer, inspector or constable," "shall apply to purchase any article of food or any drug exposed for sale, or on sale by retail on any premises, or in any shop or stores, and shall tender the price for the quantity which he shall require for the purpose of analysis, not being more than shall be reasonably requisite, if the person exposing the same for sale shall refuse to sell the same to such officer, inspector or constable, such person shall be liable to a penalty not exceeding ten pounds."⁶ The justices before whom the case is brought may, upon the request of either party, in their discretion, cause the article of food under consideration to be sent to the Commissioners of Inland Revenue, who thereupon must direct the chemical officers of their department at Somerset House to make an analysis of the article, and give a certificate of the result.⁷

⁴ 38 and 39 Vict., ch. 63, § 13.

⁵ 38 and 39 Vict., ch. 63, § 14.

⁶ 38 and 39 Vict., ch. 63, § 17.

⁷ 38 and 39 Vict., ch. 63, § 22.

The statute does not make this particular certificate conclusive, although, as a matter of practice, it naturally carries very great weight.

If there be substantial evidence on the other side, it is not conclusive, it is clear. *Fyfe v. Hamilton*, 1 Adam 484; *Todd v. Cochrane*, 3 Adam 357, 38 Sc. L. R. 801. See *Dargie v. Dunbar*, 11 *Rettie* (J. C.) 37, where a majority of the judges held that this Somerset House cer-

§ 521. When Certificate Not Evidence.

Only in the particular instance specified is the certificate of the analyst evidence. Thus if it is made evidence in a prosecution under one section of a statute, it is not evidence in a prosecution under another section.¹ And so where a statute made the certificate evidence in an action against a retailer of goods, it was held not admissible in an action against a wholesaler.²

§ 522. Form of Analyst's Certificate Under English Statute.

The following form has been provided by rules and regulations of constituted authority under the English statute:

"To (give name of person submitting article for analysis):

"I, the undersigned, public analyst for the, do hereby certify that I received on the day of 19. . . ., from (here insert name of the person delivering the article), a sample of for analysis (which then weighed), and have analyzed the same, and declare the result of my analysis to be as follows:

"I am of opinion that the same is a sample of genuine—[or, I am of opinion that the said sample contained the parts as under, or the percentages of foreign ingredients as under]
 1.]

"As witness my hand this day of

"A. B.,

"at."

tificate was not admissible in evidence. "But this view would certainly not be followed by an English court." *Bell's Sale of Food and Drugs Act* (5th Ed.), p. 73.

¹ *People v. Schintzius*, 61 N. Y. Misc. 410, 113 N. Y. Supp. 313; *Regina v. Smith* [1896], 1 Q. B. 596, 60 J. P. 372, 65 L. J. M. C. 104, 74 L. T. 348, 44 W. R. 492, 18 Cox C. C. 307.

² *Tyler v. Kingham* [1900], 2 Q. B. 413, 64 J. P. 598, 69 L. J. Q. B. 630, 83 L. T. 169, 19 Cox C. C. 547.

¹ "Here the analyst may insert at his discretion his opinion as to whether the mixture (if any) was for the purpose of rendering the article potable or palatable, or of preserving it, or of improving the appearance, or was unavoidable;

This form has been repeatedly before the English courts, and a number of decisions have been made with reference thereto.² The weight of the sample need not be stated unless such weight is material to the accuracy of the analysis.³ Under the section making it an offense to mix, color, stain or powder any article of food with any ingredient or material so as to render the article injurious to health, with the intent that it may be sold in that State, the form given above is sufficient, and it need not state that the article was injurious to health.⁴ The certificate should state whether any change had taken place in the article analyzed before the analysis, and a failure to do so is fatal to the prosecution based on the certificate,⁵ and the defect can not be cured by oral evidence.⁶ Where the charge was a sale of whisky adulterated with thirteen percent of water in excess of the proper amount, and the analyst's certificate ran as follows: "I find the sample contains an excess of water over and above what is allowed by Act of Parliament. I estimate the excess of water at thirteen percent of the entire sample. I am of opinion that the said sample is not a sample of genuine whisky." the court held the certificate was too vague. As it stood, it did not disclose any offense; for aught that appeared to the

and may state whether in excess of what is ordinary, or otherwise, and whether the ingredients or materials mixed are or are not injurious to health. In the case of a certificate regarding milk, butter, or any article liable to decomposition, the analyst shall specially report whether any change had taken place in the constitution of the article that would interfere with the analysis." Taken from Bell's Sale of Food and Drugs Act (5th Ed.) 88.

² The certificate of the analysts of the government (Somerset House) laboratory need not be in this form. *Foot v. Findlay* [1909],

1 K. B. 1, 72 J. P. 494, 78 L. J. K. B. 48, 99 L. T. 798, 25 T. L. R. 10, 6 L. G. R. 1129.

³ *Sneath v. Taylor* [1901], 2 K. B. 376, 65 J. P. 548, 70 L. J. K. B. 872, 49 W. R. 719; *Hunter v. Wintrup*, 7 *Fraser* (J. C.) 22, 4 *Adam* 471, 42 *Sc. L. R.* 277.

⁴ *Hull v. Horsnell*, 68 J. P. 591, 92 L. T. 81, 21 T. L. R. 32, 20 *Cox C. C.* 759, 2 L. G. R. 1280.

⁵ *Hunter v. Wintrup*, 7 *Fraser* (J. C.) 22, 4 *Adam* 471, 42 *Sc. L. R.* 277.

⁶ *Peart v. Barstow*, 44 J. P. 699; *Hudson v. Bridge*, 67 J. P. 186, 19 T. L. R. 369.

contrary, the analyst might not have known of the Act which determined the amount of lawful admixture. It was impossible to tell what was the excess of water until it was known what was the quantity exceeded. The certificate ought to have stated the total amount of water found in the sample.⁷ Where the certificate was, "I am of opinion that the said sample contained the percentage of foreign ingredients as under: 5 percent of added water to the prejudice of the purchaser," it was held that this certificate was bad as evidence of adulteration, because it did not state the constituent parts of the sample analyzed, and that, in such a case as this, the constituent parts should be stated. "If the analyst found in the milk," said the court, "some material substance which ought not to be found in milk at all, it would be sufficient for the certificate to state that the sample . . . contained so much percent of foreign ingredient; but when the magistrates have to decide whether the sample contained . . . added water, the question becomes much more difficult, because water is to be found in milk in its purest state. . . . I think the magistrates are entitled to inquire—and the Legislature intended they should have a statement in such a case as this—of the parts of which the sample was composed. To say merely that the sample of milk contained five percent of added water is only to state the analyst's own opinion that water has been added. The magistrates have to exercise their own judgment on the question; . . . they ought to be informed . . . what is the total percentage of water." Again: "Where the thing said to be added is one of the constituents of the article analyzed . . . the analyst . . . must state the facts on which he has come to his conclusion sufficiently to enable the magistrates to come to a conclusion themselves."⁸ In a subsequent case this case

⁷ *Newby v. Sims* [1894], 1 Q. B. 478, 58 J. P. 263, 63 L. J. M. C. 228, 70 L. T. 105. In *Fortune v. Hanson* [1896], 1 Q. B. 202, 60 J. P. 88, 65 L. J. M. C. 71, 74 L. T. 145, 44 W. R. 431, 18 Cox C. C. 258, was a deficient cer-

tificate. The case of *Bakewell v. Davis* [1894], 1 Q. B. 296, 58 J. P. 228, 63 L. J. M. C. 93, 69 L. T. 832, can not well be reconciled with these two cases.

⁸ *Fortune v. Hanson* [1896], 1 Q. B. 202, 60 J. P. 88, 65 L. J.

of *Fortune v. Hanson* was distinguished. The analyst's certificate was, "I am of the opinion that the sample contains the parts as under: milk 94 percent, added water 6 percent. This opinion is based on the fact that the sample contained 7.97 solids not fat, whereas genuine milk contains not less than 8.5 solids not fat." "What the analyst has done here has been," said the court, "not only to state the percentage of added water, but also to give the scientific basis on which his conclusion rests; and, therefore, I think that . . . the certificate in the case is good. . . . The certificate differs from that in *Fortune v. Hanson*, because it gives the reasons for the analyst's conclusions, and on the information so given the party charged can, if he thinks proper, act, and the justices can form a judgment."⁹ In an instance of an analysis of beer, the analyst certified that it "contained arsenic," and in another certificate stated that it contained "a serious quantity of arsenic;" the court held the certificates insufficient. "We are all of the opinion that these two certificates are not sufficient. It is very important that the practice should be uniform, and we think it is clear that the certificate of the analyst must be a document in proper form, and that that certificate ought to contain in it sufficient materials to enable the magistrates to form a judgment on those materials whether the offense charged had been committed."¹⁰ In another instance of a charge of selling watered brandy, the certificate was, "I am of opinion that the sample contained the parts as under, or percentages of foreign ingredients as under: It has been reduced from 25 degrees under proof to 27.6 degrees under proof." Although the magistrates held this certificate insufficient,¹¹ yet the High Court held it sufficient.¹² In a case of analysis of milk the certificate stated:

M. C. 71, 74 L. T. 145, 44 W. R. 290, 65 J. P. 646, 70 L. J. K. B. 431, 18 Cox C. C. 258. 747, 84 L. T. 719, 49 W. R. 684.

⁹ *Bridge v. Howard* [1897], 1 Q. B. 80, 60 J. P. 790, 65 L. J. M. C. 229, 75 L. T. 300, 45 W. R. 78, 18 Cox C. C. 421. ¹¹ Relying upon *Newby v. Sims* [1894], 1 Q. B. 478, 58 J. P. 263, 63 L. J. M. C. 228, 70 L. T. 105.

¹⁰ *Lee v. Bent* [1901], 2 Q. B. 88 L. T. 465, 19 T. L. R. 353, 1 ¹² *Findlay v. Haas*, 67 J. P. 198,

"Milk fat 1.4 percent; deficiency in milk fat 53.4 percent." This certificate was held sufficient, although it did not in terms state how much fat milk should contain; but this could be arrived at by an easy calculation from the figures given.¹³ Where a defendant was charged with sending by railway milk with 22 percent of fat less than natural (an offense under the English statute), and the analyst's certificate stated that fact, and added, by way of observation, "the abstraction of fat is a fraud," it was held that the certificate need not set out the constituent parts of the sample analyzed when the case is not one of adulteration, it only being necessary to state the "result" of the analysis. It was said that the "observations" which, in the form of the certificate given above, follow after the result of the analysis, are only to be made where the case is one of adulteration; but the addition, in cases where adulteration is not charged, of "observations" amounting only to an expression of opinion on the part of the analyst, and not to a finding of fact, although unauthorized and improper, would not vitiate the certificate.¹⁴ Under a section of a statute making it an offense to sell an article of food rendered injurious to health by being mixed and colored with some ingredient or material, it is not sufficient that the court should find that the ingredient mixed with the article of food is injurious to health. In such an instance, however, the certificate set out above is not rendered insufficient to support a conviction under the sections referred to, by reason of the fact that it is not expressly stated therein that the article of food analyzed had been rendered injurious to health by being mixed and colored with any ingredient or material.¹⁵ In another case a druggist was summoned for selling a drug,

L. G. R. 377. The distinction between this case and *Newby v. Sims* is that in this case the analyst showed he knew the provisions of the section under which it was sought to prosecute the defendant, and stated how far the sample fell below the requirements of that section.

¹³ *Bayley v. Cooke*, 69 J. P. 139, 92 L. T. 170, 53 W. R. 410, 20 Cox C. C. 779, 3 L. G. R. 304.

¹⁴ *Bakewell v. Davis* [1894], 1 Q. B. 296, 58 J. P. 228, 63 L. J. M. C. 93, 69 L. T. 832.

¹⁵ *Hull v. Horsnell*, 68 J. P. 591, 92 L. T. 81, 20 Cox C. C. 759, 21 T. L. R. 32, 2 L. G. R. 1280.

known as vinegar of squills, not of the nature, substance and quality of the article demanded by the customer. The analyst gave the following certificate: "I, the undersigned public analyst, do hereby certify that I received on January 7th, 1902, a sample of vinegar of squills for analysis (which then weighed about three ounces), and have analyzed the same, and declare the result to be as follows: I am of the opinion that it is deficient in acetic acid to the extent of 40 percent. This opinion is based upon the fact that the sample contained only 2.5 percent of acetic acid, whereas it should have contained at least 4.2 percent of acetic acid." Nothing was said under the head of observations, and the analyst did not report whether any change had taken place in the constitution of the article that would interfere with the analysis. The British Pharmacopoeia did not prescribe the quantity of acetic acid which should be present in the compound drug. It defined the constituents in making the same, the result being that 4.2 of acetic acid is originally brought in as an ingredient. A small and varying portion of this is lost during the process of manufacture, and a further gradual diminution takes place more or less rapidly according to the care used in storage. It was proved that it was not possible to determine by analysis whether the deficiency of acetic acid arose from imperfect compliance with the process of manufacture as prescribed by the British Pharmacopoeia, and the whole deficiency might have been caused by the subsequent process of decomposition. The disappearance of acetic acid, it was shown, does not affect the quality of the drug. The decomposition of vinegar of squills does not render the article incapable of accurate analysis as milk or butter. It was held that the British Pharmacopoeia did not prescribe any standard for vinegar of squills, but only prescribed the proper process of manufacture; and, further, that vinegar of squills is an article liable to decomposition within the meaning of the note to the schedule prescribing the form of the certificate, and that the certificate was bad, no notice of such decomposition having been referred to by the analyst in his

certificate, and, *semble*, that the defect could not be cured by calling the analyst.¹⁶

§ 523. Decisions Under English Food and Drugs Statute.

Under the English statute set forth in substance in the previous section the words "any purchaser" are construed to mean both an official and a private purchaser. The statute applies to any private purchaser purchasing for consumption. It is not a condition precedent to a prosecution by a purchaser for consumption to recover a penalty that he should give the seller notice of "his intention to have" the article analyzed; it is only necessary to give such a notice when the analyst certificate is to be made evidence that the milk sold is adulterated.¹ If an officer prosecutes the person for selling adulterated food, he need not prove as a condition precedent that he was directed by the local authority appointing him such constable to prosecute the offender.² Under this statute the officer may make the purchase by deputy, and then prosecute the offender in his own name.³ And where an inspector sent his servant into a public house to purchase gin, which was adulterated, and when the servant had been in the house a

¹⁶ *Hudson v. Bridge*, 67 J. P. 186, 19 T. L. R. 369, 1 L. G. R. 400.

¹ *Hotchin v. Hindmarsh* [1891], 2 Q. B. 181, 57 J. P. 775, 60 L. J. M. C. 146, 65 L. T. 149, 39 W. R. 607; *Buckler v. Wilson* [1896], 1 Q. B. 83, 60 J. P. 118, 65 L. J. M. C. 18, 73 L. T. 580, 44 W. R. 220; *Enniskillen Union v. Hilliard*, 14 L. R. Irish 214. The case of *Rouch v. Hall*, 6 Q. B. Div. 17, 45 J. P. 220, 50 L. J. M. C. 6, 29 W. R. 204, and *Rex v. Mahoney* [1909], 2 Irish R. 490, are no longer authorities in England.

Of course a notice of the officer's capacity in requesting the sale of a sample to him need not be given to sustain a prosecution for a re-

fusal to make a sale. This is because of the phraseology of the statute. *Clarkin v. McCartan*, 22 Irish L. T. 95. See *Rolfe v. Thompson* [1892], 2 Q. B. 196, 56 J. P. 425, 61 L. J. M. C. 184, 67 L. T. 295, 17 Cox C. C. 551; *Morton v. Fyfe*, 24 *Rettie* (J. C.) 9, 2 *Adam* 174, 34 Sc. L. R. 55; *Tyler v. Dairy*, 72 J. P. 132, 98 L. T. 867, 6 L. G. R. 422.

² *Hale v. Cole*, 55 J. P. 376. See also *Connor v. Butler* [1902], 2 Irish Rep. 569.

³ *Horder v. Scott*, 5 Q. B. Div. 552, 44 J. P. 520, 795, 48 L. J. M. C. 97, 42 L. T. 660; *Smith v. Stace*, 45 J. P. 141.

minute, and had paid for the gin with money supplied him by the inspector for that purpose, the inspector entered, gave the usual notification, and ultimately laid an information against the seller, it was held that he should prosecute the seller and not the servant.⁴ Where an official purchaser purchases for analysis, it is necessary that the analysis should be actually made by the public analyst, and such analysis is a condition precedent to a prosecution under the statute, even though the seller admits at the time of the sale that the article sold is adulterated.⁵ But if the prosecution is by a private person, then there need not be an official analysis; for, as said, "There is nothing in the Act to prevent the proof of an offense by other satisfactory evidence; nor is it necessary that the purchaser should obtain the certificate of the public analyst, except when he purchases with an intention of submitting to analysis."⁶ When the sample is taken by an official purchaser for analysis, notice must be given to the vendor that the purchase had been made with the purpose and intention to have the sample analyzed by the public analyst. This is a condition precedent to make the certificate evidence. The notice must state that the purchase was made with the intention to have the analysis made "by the public analyst." Yet the language of the statute need not be used if the intention be made known to the seller. "No particular form of words is required, nor even any words at all. What is necessary is that the seller must know that the samples are to be taken for the purpose of analysis, so that he may see that the sam-

⁴ *Garforth v. Esam*, 56 J. P. 521; *Macauley v. Mackirdy*, 3 White's Rep. (Sc.) 464. The same ruling was made when a street scavenger, at the request of the inspector, went in and made the purchase. *Massey v. Kelso*, 4 Fraser (J. C.) 73, 39 Sc. L. R. 645; *Tyler v. Dairy Supply Co.*, 72 J. P. 132, 98 L. T. 867, 6 L. G. R. 422.

⁵ *Smart v. Watts* [1895], 1 Q.

B. 219, 59 J. P. 54, 64 L. J. M. C. 89, 71 L. T. 768, 43 W. R. 379, 18 Cox C. C. 62; *Peart v. Barstow*, 44 J. P. 699; *Regina v. Smith* [1896], 1 Q. B. 596, 60 J. P. 372, 65 L. J. M. C. 104, 74 L. T. 348, 44 W. R. 492, 18 Cox C. C. 307.

⁶ *Regina v. Smith*, *supra*. *Contra Rex v. Mahoney*, 2 Irish Rep. 490, explaining *Enniskillen Union v. Hilliard*, 14 L. R. Irish 214.

ples are fairly taken.”⁷ This English statute requires the purchaser to “forthwith” notify the seller or his agent selling the article of his intention to have the article of food analyzed. This means that the notice must be given “at the moment of time at which the seller parts with the article;” and a notice given two days after the purchase was held to be too late.⁸ On the other hand, an inspector sent a constable in plain clothes into the defendant’s inn to buy a bottle of gin. The constable, having purchased the gin, came out, and two minutes later both men went inside and told the defendant that the gin was purchased for analysis. The trial court held that the case must be dismissed on the ground that the object of the purchase had not been notified “forthwith;” but the higher court held, without hesitation, that the lower court was wrong.⁹ The statute requires the notice to be given “to the seller or his agent selling the article.” In one instance it was held that, where milk had been sent up to London by train, a railway porter at the terminus at which the milk arrived was not the agent of the seller for the purpose of receiving this notice.¹⁰ The notification must be given and an analysis actually made, even if the fact of adulteration is admitted at the time of the sale, where the prosecution is by an officer. Thus, an inspector bought some butter at a shop. Immediately after the sale the manager of the shop admitted that the butter was, in fact, oleomargarine.

⁷ *Wheeker v. Webb*, 51 J. P. 661. In this case the purchaser informed the seller he purchased the article to be analyzed by the “county analyst,” when he should have said by the “public analyst.” This was held sufficient. The court explained *Barnes v. Chipp*, 3 Exch. Div. 176, 47 L. J. M. C. 85, 38 L. T. 570, 26 W. R. 635, by saying that it “is no authority for more than this, that the seller must know that the analysis is to be made by an official person. In that case . . . the court came to the conclusion

that the seller did not know that there was to be an official analysis. That was a totally different case from this, for here the justices have found that the seller did know that there was to be an official analysis.”

⁸ *Parsons v. Birmingham*, 51 L. J. M. C. 111, 30 W. R. 748.

⁹ *Somerset v. Miller*, 54 J. P. 614.

¹⁰ *Rouch v. Hall*, 6 Q. B. Div. 17, 45 J. P. 220, 50 L. J. M. C. 6, 29 W. R. 304.

In consequence of this admission the inspector did not notify him that the article was purchased for analysis, nor did he procure an analysis to be made. It was held that the notification ought to have been given and the analysis made, notwithstanding the admission, and quashed the conviction.¹¹ The English statute requires the purchaser to "divide the article into three parts, to be then and there separated, and each part to be marked and sealed, or fastened up in such manner as its nature will permit, and shall, if required to do so, deliver one of the parts to the seller or his agent."¹² Under this provision each part must be sufficient to admit of its being properly analyzed,¹³ but it is no objection that the third part, through accident, afterwards becomes unfit for analysis.¹⁴ The separation must be made from one undivided sample. Thus, where an inspector bought six bottles of camphorated oil and divided them into three lots of two bottles each, putting each lot into a separate bag and sealing them, and he gave one lot to the seller, sent one lot for analysis and kept the third lot, and he did not open the bottles nor mix nor divide their contents, it was held that he had not satisfied the requirements of the statute.¹⁵ But where an inspector asked for cream of tartar, and a box of small packets was produced, and he asked for four packets, opened them, and poured their contents into one heap, which he divided into three parts, it was held that he had bought one article, and had complied with the statute quoted.¹⁶ In one instance

¹¹ *Smart v. Watts* [1895], 1 Q. B. 219, 59 J. P. 54, 64 L. J. M. C. 89, 71 L. T. 768, 43 W. R. 379, 18 Cox C. C. 62.

This is not the case in a private prosecution. *Buckler v. Wilson* [1896], 1 Q. B. 83, 60 J. P. 118, 65 L. J. M. C. 18, 73 L. T. 580, 44 W. R. 220.

¹² 38 and 39 Vict., ch. 63, § 14.

¹³ *Lowery v. Hallard* [1906], 1 K. B. 398, 70 J. P. 57, 75 L. J. K. B. 249, 93 L. T. 844, 54 W. R. 520, 21 Cox C. C. 73, 4 L. G. R. 189.

¹⁴ *Suckling v. Parker* [1906], 1 K. B. 527, 70 J. P. 209, 75 L. J. K. B. 302, 94 L. T. 554, 54 W. R. 438, 21 Cox C. C. 145, 4 L. G. R. 531.

¹⁵ *Mason v. Cowdary* [1900], 2 Q. B. 419, 64 J. P. 662, 69 L. J. Q. B. 667, 82 L. T. 802, 49 W. R. 28, 19 Cox C. C. 536.

¹⁶ *Smith v. Savage* [1905], 2 K. B. 88, 69 J. P. 245, 74 L. J. K. B. 576, 92 L. T. 775, 53 W. R. 477, 20 Cox C. C. 847, 3 L. G. R. 582.

a milkman had a contract to supply a large amount of milk daily to a hospital, which he delivered in sixteen cans and poured them all into one large receptacle at the hospital. Before they were poured out an inspector took a sample from each of a number of the cans, and had them analyzed separately. The Court of Justiciary of Scotland held that the samples ought to have been mixed before analysis.¹⁷ The purchaser must retain one of the three parts "for future comparison, and submit the third part, if he deems it right to have the article analyzed, to the analyst."¹⁸ This third part need not be analyzed to procure a conviction, but it must be "sealed or fastened up in such manner as its nature will permit." Such was held to be the case where the third part of a sample of milk was placed in a bottle and corked, but the cork was not tied down, and the milk fermenting, blew the cork out, and part of the contents escaped, so that the government analyst could not make an accurate analysis. At the trial the defendant called for the production of an analysis of the third part. The appellate court held that it was not a condition precedent that the third part should be analyzed, but the trial court must find whether or not such third part had been "sealed or fastened up in such manner as its nature will permit."¹⁹ Somewhat at variance with *Suckling v. Parker* is a Scotch case, where the prosecutor failed to furnish the third sample upon the demand of the defendant because the bottle containing it had been accidentally broken; and it was held that the failure to produce the sample was fatal to the prosecution.²⁰ The sample need not be dated; if it be dated with a wrong date the mistake is immaterial.²¹ It is made an offense not to furnish a sample to an officer upon demand made by him. The officer has the right

¹⁷ *Telford v. Fyfe* [1907], Sess. Cas. (J.) 83.

¹⁸ 38 and 39 Vict., ch. 63, § 14.

¹⁹ *Suckling v. Parker* [1906], 1 K. B. 527, 70 J. P. 209, 75 L. J. K. B. 302, 94 L. T. 554, 54 W. R. 438, 21 Cox C. C. 145, 4 L. G. R. 531.

²⁰ *Hutchinson v. Stevenson*, 4 Fraser (J. C.) 69, 3 Adam 651, 39 Sc. L. R. 789.

²¹ *Howe v. Knowles* [1909]. Sess. Cas. (J.) 61, 46 Sc. L. R. 881.

to demand that the sample be furnished him out of a particular receptacle. In one case an inspector in plain clothes was supplied by a publican with rum out of a bottle which stood on a shelf in the bar. After tasting it, the inspector asked for half a pint of rum. The publican thereupon was about to supply it out of another vessel, but the inspector demanded to be supplied out of the same bottle, saying he was an inspector, and that it was for analysis. The publican refused, was summoned, and convicted. This conviction was affirmed by the High Court upon a case stated; and it was held that the publican was bound to supply the sample out of the same bottle as that from which he had originally served the inspector. "The inspector," said the court, "demanded to be supplied with a sample taken out of the same bottle. I think he was entitled to this; for, if he were not so, nothing would be easier than for the seller to keep two vessels, and supply purchasers out of one when the article was intended for consumption, and supply out of the other when the article was intended for analysis. Without, therefore, going so far as to say that an inspector is entitled to go into a shop and demand to have a sample out of any vessel he likes, I think that as he had already been supplied out of a particular bottle he was entitled to have the sample taken from that bottle."²² When a sample is demanded for analysis, the seller has a right to demand the purchaser's authority; but if he do not make such a demand he waives his right to thereafter raise a question that the officer did not reveal his official character to him.²³ Even a wholesaler, on demand, must furnish a sample, though he must break a wholesale package to comply with the demand, and it is the custom of the market not to do that.²⁴ By a refusal to sell when the owner knows the purchaser is an officer, such owner of the article incurs a penalty. At times it is difficult to determine what is a refusal. But where a policeman under the orders of the in-

²² *Payne v. Hack*, 58 J. P. 165.
See also *Farley v. Higginbotham*,
42 Sol. J. 309.

²³ *Payne v. Hack*, 58 J. P. 165.
See *Hale v. Cole*, 55 J. P. 376.

²⁴ *McHugh v. McGrath* [1894],
2 Irish Rep. 71, 27 Irish L. T. 102.

spector asked the servant of a shopkeeper for coffee, and was supplied with coffee, and on being told that it was for analysis the servant seized the coffee and upset it on the floor, and the policeman then asked for some more coffee out of the same tin, and was refused, the shopkeeper saying that the servant had orders only to sell that coffee as coffee and chicory, it was held that there had been a refusal to sell, and that the shopkeeper was liable for the act of his servant.²⁵ So where a milk dealer was selling milk to the public out of a can, and was supplying it out of the "cran" (i. e., top or syphon), and an inspector asked for a sample, and the seller offered one from the top of the can, but refused to supply one from the "cran," it was held that the seller was guilty of refusing to sell a sample, but not guilty of obstructing an inspector in the performance of his duty.²⁶ In another instance a milk dealer was exposing for sale in the street milk which, in fact, was skimmed. On being asked by an inspector for a pint of new milk, he upset the can into the gutter and said, "I was not going to let you have skimmed milk for new." He had regular customers for skimmed milk, and there was no direct evidence that he was intending to sell this milk as new milk. It was held that there was no evidence of an exposal for sale as new milk, and that, therefore, he could not be convicted for refusing to sell.²⁷ It is not larceny for the seller to repossess himself of the sample and offer to return the money. Such was held to be the case where the inspector bought a sample of coffee and paid for it, and when the seller heard that it was bought for analysis he snatched it out of the inspector's hand and said it was not sold as pure coffee, pointing to a label on the tin, and offered to return the money.²⁸ The certificate of the analyst, when the proper steps have been taken, is only evidence against the person from whom the article for analysis was obtained, and not against the person from whom he obtained it. Thus,

²⁵ *Farley v. Higinbotham*, 42 Sol. J. 309.

²⁶ *Souter v. Kerr* [1907], Sess. Cas. (J.) 49, 5 *Adams* 260.

²⁷ *French v. Card*, 73 J. P. 389, 101 L. T. 423.

²⁸ *Hewson v. Gamble*, 56 J. P. 534.

where the article was obtained from a retailer, it was held that the certificate was not evidence against the wholesaler from whom the retailer obtained it.²⁹ If the certificate of the analyst, when all the proper steps under the statute have been taken, be not contradicted, it is conclusive of the fact that the food was adulterated food when it is to that effect.³⁰ But if there be conflicting evidence, then the analyst certificate is not conclusive of the fact of adulteration. Thus, where the certificate, after setting out the constituent parts of the sample, stated that, in the analyst's opinion, the milk had been watered, and the seller did not require the analyst to be called, but tendered himself as a witness, and gave evidence to show that the milk had not been watered,³¹ it was

²⁹ *Tyler v. Kingham & Son* [1900], 2 Q. B. 413, 64 J. P. 598, 69 L. J. Q. B. 630, 83 L. T. 169, 19 Cox C. C. 547. See also *Regina v. Smith* [1896], 1 Q. B. 596, 60 J. P. 372, 65 L. J. M. C. 104, 74 L. T. 348, 44 W. R. 492, 18 Cox C. C. 307.

³⁰ *Harrison v. Richards*, 45 J. P. 552; *Elder v. Dryden*, 72 J. P. 355, 99 L. T. 20, 6 L. G. R. 786. But see *MacLeod v. O'Neil*, 9 *Rettie* (J. C.) 32.

³¹ *Hewitt v. Taylor* [1896], 1 Q. B. 287, 60 J. P. 311, 65 L. J. M. C. 68, 74 L. T. 51, 44 W. R. 431, 18 Cox C. C. 226; *Fyfe v. Hamilton*, 1 *Adam* 484; *Todd v. Cochran*, 3 *Adam* 357, 38 *Sc. L. R.* 801.

But it has been held that an analysis of margarine made on the footing that the margarine was sold as butter was not admissible to show what the composition of margarine sold as margarine ought to be. In the case in question the evidence of the analysis was given verbally, but the principle seems

equally applicable to a written certificate. *Roberts v. Leeming*, 69 J. P. 417, 3 L. G. R. 1031.

It may be doubted if the analyst can by oral evidence supplement a deficiency in the written certificate. *Hudson v. Bridge*, 67 J. P. 186, 19 T. L. R. 369.

In a suit for a breach of warranty, the certificate of the analyst can not be used. *Regina v. Smith* [1896], 1 Q. B. 596, 60 J. P. 372, 65 L. J. M. C. 104, 74 L. T. 348, 44 W. R. 492, 18 Cox C. C. 307.

For decisions on obstructing milk inspectors, see *Taylor v. Nixon* [1910], 2 *Ir. Rep.* 94; *Ford v. Urquhart*, 21 *Vict. L. R.* 690; *Roche v. Davis*, 29 *Vict. L. R.* 394; 25 *Aust. L. T.* 108; 9 *Aust. L. R.* 205.

To make an obstruction of an officer an offense, the act must be an intentional misconduct involving mens rea. Thus where a servant of the defendant deliberately broke a bottle of liquor when a sample was demanded, it was held that such defendant was not liable,

held by the High Court that the magistrates were right in dismissing the case upon the whole of the evidence before them.

unless the servant broke it at his request or connivance. *Taylor v. Nixon* [1910], 2 Irish Rep. 94.

A purchaser divided an article purchased into three parts, sealed up each part, and returned one to the seller. It was held that this was a sufficient notice to the seller of the intention of the purchaser to have the article submitted for analysis. *Ford v. Urquhart*, 21 Vict. L. R. 690, 17 Aust. L. T. 299, 2 Aust. L. R. 110.

An inspector purchased three bottles of vinegar and then mixed them. He then filled each bottle from the mixture and gave one to

the vendor after sealing them and informed him that the purchase was with the intent to have the vinegar analyzed. It was held that this was a purchase of one "article of food" as the statute required. *Roche v. Davis*, 29 Vict. L. R. 394, 25 Aust. L. T. 108, 9 Aust. L. R. 205, discussing and distinguishing *Mason v. Cowdary* [1900], 2 Q. B. 419, 69 L. J. Q. B. 667, 82 L. T. 802, 49 W. R. 28, 64 J. P. 662, 19 Cox C. C. 536, and *Fecitt v. Walsh* [1891], 2 Q. B. 304, 55 J. P. 726, 60 L. J. M. C. 143, 65 L. T. 82, 39 W. R. 525, 17 Cox C. C. 322.

CHAPTER XI.

INSPECTORS.

SEC.

524. Inspectors and their powers.

525. Reinspection.

526. Inspection of food and grain
in transit.

SEC.

527. Action to recover penalties.

528. Civil liability of inspectors.

§ 524. Inspectors and their Powers.

Statutes very frequently provide for the inspection of foods, and even drugs occasionally, by officers of the State; and those, as we have seen in the chapter on constitutional powers, are valid. The power to require inspection is often conferred upon cities, either by their charters or by general statutes.¹ The power of inspectors must be conferred by statutes; and when so conferred must be strictly pursued. Unless a statute authorizes an inspector to do so, he can not inspect by an agent and by such agent demand and take samples.² Power to appoint inspectors may be conferred upon boards of trade and the like,³ but in conferring such power the Legislature does not intend that the powers and privileges conferred shall be used for the private gain and profit of such boards.⁴ A statute may give the right to demand samples of the food

¹ A power "to provide for and regulate the inspection of meat, poultry," etc., and "to do all acts and make all regulations which may be necessary or expedient for the promotion of health or the suppression of disease," confers powers to establish a public slaughter house for the purpose of securing proper inspection of fresh meats. *Huesing v. Rock Island*, 128 Ill. 465,

21 N. E. 558, 15 Am. St. 129, reversing 25 Ill. App. 600; *St. Louis v. Shands*, 20 Mo. 149.

² *Commonwealth v. Smith*, 141 Mass. 135, 6 N. E. 89. See also *East St. Louis Board of Trade v. People*, 105 Ill. 382.

³ *State v. Casey*, 38 Ohio St. 555.

⁴ *Jones v. Board*, 52 Kan. 95, 34 Pac. 453.

examined for analysis, and regulate the manner in which it shall be kept.⁵

§ 525. Reinspection.

An ordinance required that all fresh fish in packages brought into the city enacting it for sale should be inspected and branded. It was held that this did not require packages of fresh fish made up from other inspected and branded packages should again be inspected or branded.¹ So a statute requiring the inspection of flour intended for export does not require that flour once inspected and shipped, and afterwards damaged in transit, as at sea, shall again be inspected before being exported.²

§ 526. Inspection of Food or Grain in Transit.

As a rule, food in transit through a State is not subject to inspection laws.¹ Thus a statute of North Dakota provided that it shall be the duty of every public warehouseman to receive for storage any grain, dry and in a suitable condition; and that such grain in all cases be inspected and graded by duly authorized inspectors. It also prescribed in a separate section that "the charge for the inspection of grain shall be and constitute a lien on the grain so inspected, and when such grain is in transit the charges shall be treated as charges, to be paid by the common carrier in whose possession the same is at the time of inspection." It was held that the words "in transit" did not apply to interstate

⁵ A State requiring the sample to be "sealed up" and delivered to the defendant or his attorney, requires the wax with which it is sealed to be extended over the mouth of the bottle, when the sample taken is a liquid and put in a bottle, so as to make it air tight. *Commonwealth v. Lockhart*, 144 Mass. 132, 10 N. E. 511.

As to inspection of export and non-exported articles under various

statutes, see *Ex parte Robinson*, 29 Tex. App. 186, 15 S. W. 603; *Hancock v. Sturges*, 13 Johns. 331; *Commonwealth v. Riddle*, 3 Pa. Law Jur. 487.

¹ *Chicago v. Hobson*, 52 Ill. 482.

² *Griswold v. New York Ins. Co.*, 1 Johns 205.

¹ *Georgetown v. Davidson*, 6 D. C. 278. But see *Commonwealth v. King*, 1 Whart. 448, and *Nicholls v. Johnston*, 2 Harris (Pa.) 279.

commerce shipments, and that inspectors could not require common carriers to open cars containing wheat consigned to other States for inspection at State lines.²

§ 527. Actions to Recover Penalties or Damages.

On a trial for selling food not inspected, when a statute makes it an offense to sell noninspected food, the prosecution must give some evidence in support of the averment of the want of inspection.¹ Under a statute requiring flour to be inspected, the "persons injured" by a sale without inspection are not the flour inspectors; and they can not sustain an action on the statute to recover the penalty as inspectors of flour.² In an action to recover the penalty prescribed in a statute regulating the inspection of food, for altering the inspector's marks on barrels of flour, it is necessary to set out the marks and how altered.³

§ 528. Civil Liability of Inspectors.

An inspector of food is responsible personally for want of ordinary diligence in the discharge of his official duties.¹ He is liable in an action for negligence to a person injured by his neglect in the performance of his duty; but he is not liable for an honest mistake—only for a reckless disregard of his duty that results to another.² But it has been

² *Great Northern Ry. Co. v. Walsh*, 47 Fed. 406.

¹ *Cheadle v. State*, 4 Ohio St. 477.

² *Hatch v. Robinson*, 26 Vt. 737.

Under the Virginia Act of Dec. 21, 1792, regulating the inspection of flour and bread in the District of Columbia, it was not necessary that the United States should be nominally a plaintiff, but the penalty may be recovered in an action *qui tam*. *Cloud v. Hewitt*, 3 Cranch C. C. 199, Fed. Cas. No. 2904.

³ *Cloud v. Hewitt*, 3 Cranch C. C. 199, Fed. Cas. No. 2904.

Cutting out a brand is an alteration of it, and renders one liable, even though done ignorantly. *Smith v. Brown*, 1 Wend. 231.

¹ *Tardos v. Bozant*, 1 La. Ann. 199; *Hayes v. Porter*, 22 Me. 371; *Nickerson v. Thompson*, 33 Me. 433; *Pearson v. Purkett*, 15 Pick. 264; *Kamman v. Lane*, 55 Mich. 426, 21 N. W. 872; *McKenna v. Bodine*, 6 Phila. 582.

² *McKenna v. Bodine*, 6 Phila. 582.

held that a fish inspector whose duty it was to inspect fish offered for sale, and destroy such as are unwholesome, had judicial duties and powers, and while acting within his jurisdiction, was not liable for the careless, improper or erroneous performance of his duties, though he knew his unfitness for the office.³ An inspector has been held liable when a statute provides for the liability for his deputy's want of reasonable skill, care and fidelity in the discharge of his duty, but he was not responsible for his mere errors of judgment.⁴ In an action, under such statute, against the inspector for damages sustained by the default of a deputy in branding a cargo which the plaintiff had purchased and exported, the measure of damages was held to be the difference between the actual value of the fish in the foreign market and the value of fish of the quality and condition indicated by the brand at the same time and place, when the fish were exported within a reasonable time after inspection to no remote or unusual place for the exportation of the same kind of fish, and were exposed to no extraordinary cause of damage.⁵ Evidence that the fish had been examined and passed inspection at the foreign market to which they were shipped was held not conclusive against the plaintiff's claims for damages, though important as evidence of their conformity to the brand.⁶ It is not competent for the inspector to prove as a defense the customary mode pursued by other inspectors, or that it was usual for inspectors to take a bond of indemnity against a deficiency in the quality, or in the condition of the article branded. Any one purchasing upon the credit of an inspector's bond may recover of him damages sustained, where the inspector affixed his brand to an article without knowing its condition.⁷ In an action to

³ *Fath v. Koepfel*, 72 Wis. 289, 39 N. W. 539.

⁴ *Pearson v. Purkett*, 15 Pick. 264. In this case it was held that the principal's liability was not limited by the amount of the penalty of his bond, when he was sued because of his agent's act.

⁵ *Pearson v. Purkett*, 15 Pick. 264.

⁶ *Pearson v. Purkett*, 15 Pick. 264.

⁷ *Nickerson v. Thompson*, 33 Me. 433.

recover damages occasioned "by the neglect of the inspector in cutting, packing, salting, and coopering the beef" inspected, the plaintiff was held entitled to recover, whether the loss was attributable to the unsuitable condition of the meat when it was packed, to the want of sufficient salt or pickle, to the want of faithful coopering, or to an apparent defect in the barrels.⁸ Where a city meat inspector went into plaintiff's place of business, a wholesale butcher, and selected, marked, and took away a number of calves, and the owner brought an action against the inspector to replevin them, and the evidence failed to show that the calves were condemned by the inspector, it was held that a recovery by the plaintiff was proper.⁹ A statute of New York fixed at four weeks the minimum age at which a healthy calf might be sold or exposed for sale for food, and provided that a person duly authorized by the Commissioners of Agriculture might examine a calf exposed for sale, and, if it was "under four weeks of age," might seize or destroy it. No provision was made for compensating the owner for the destruction of his calves. It was held that the official seizing a calf that was exposed for sale must act at his peril; and if he seized one in good faith on the claim that it was "under four weeks of age," and it was over four weeks of age, he was liable, although its physical appearance would lead any one to think it was under that age; but it was said that the Legislature "might have vested the authority to seize if the animal is actually or apparently under four weeks of age, and in that event the agent of the Commissioner of Agriculture acting in good faith might be exonerated of liability, even though the calf exceeded the age limit." But concerning calves seized that were under the age of four weeks, it was held there was no liability. In the latter instance the statute provided that a person ex-

⁸ *Hayes v. Porter*, 22 Me. 371.

⁹ *Kamman v. Lane*, 55 Mich. 426, 21 N. W. 872.

See where the inspector of wheat was held not liable for error in

stating the quality of the wheat inspected, to a purchaser of such wheat, where he relied upon the inspector's certificate. *Gordon v. Livingston*, 12 Mo. App. 267.

posing a calf for sale or shipping a calf would be presumed to be so exposing or shipping it for food; that a person shipping a calf under four weeks of age for the purpose of being raised should ship it in a crate, unless it be accompanied by its dam; and that a person duly authorized by the Commissioner of Agriculture may examine a calf exposed for sale, or kept with any stock "apparently exposed for sale," and, if it be under four weeks of age, may seize and destroy it. The owner-plaintiff shipped, consigned to himself at stockyards, a lot of calves over four weeks old, and four fresh milch cows, and with each cow its calf from ten days to two weeks old; and on their arrival at the stockyards the young calves were, though without the plaintiff's knowledge or authority, separated from the cows, and with the other calves placed in a pen where calves were to be sold and exposed for sale. It was held that the agent of the commissioner was within his authority in seizing and destroying the young calves; and this though during the day the plaintiff told the agent that such calves were to be sold with their dams, which it was lawful to do, and importuned him to let them go; and though the day on which they were seized was Sunday, which was not a sales day, and on which day the stockyards were prohibited from being open for sales; sales, in fact, being made there on Sunday, as known to the agent.¹⁰

¹⁰ Williams v. Rivenburg (N. Y. App. Div.), 129 N. Y. Supp. 473.

CHAPTER XII.

MILK.

SEC.	SEC.
529. Frequent source of litigation.	537. Analysis of milk—Certificate—Evidence.
530. Fixing a standard—Unadulterated milk.	538. Decomposition of milk samples.
531. Article unknown when statute adopted—Condensed milk.	539. Preservatives in milk.
532. Adulteration.	540. Instances of violations of statutes concerning milk.
533. Milk from which any part of the cream has been removed.	541. Milk in bottles—Size of bottles, designating.
534. Skimmed milk.	542. Dealer in milk.
535. Condensed, separated or skimmed milk.	543. Contract for adulterated milk.
536. Buttermilk.	544. Conflict between milk ordinance and statute.

§ 529. Frequent Source of Litigation.

The sale of milk has given rise to more litigation because of its adulteration than any other article of food. Statutes concerning its adulteration are stricter, usually, and more stringent in their provisions than those relating to any other food. This is natural, for the ease with which it can be adulterated and the difficulty of detection are far greater than that of any other article of food. The temptation of dealers in milk is also greater probably than that of the dealers in any other food. At one time, before the advancement of general knowledge of the fact that there was an inherent difference in milk, there was a rough estimate that "milk was milk;" and that the milk of one cow was as good as that of another, disregarding the quality when making the assertion. Gradually this idea has been eliminated from the public's mind by education and experience. The rapaciousness and greediness of milk dealers have also been a constant source of peril which it has required the heavy hand of the Legislature to restrain,

and which has brought about much severe and contentious litigation.¹

§ 530. Fixing a Standard—Unadulterated Milk.

It is a very common practice for the Legislature to fix a standard for milk, as that it shall contain a certain percentage of fats or solids. Usually the standard thus fixed requires 12, and sometimes 13, percent of milk solids, or not to exceed 88 or 87 percent of watery fluids. When such is the case, in a prosecution for a violation of the provisions of the statute, it is not necessary to allege what reduced the milk below the legal standard.¹ When a statute requires a certain percentage of solids, a sale of milk not having that percentage is a violation of the provisions, though no adulterating matter has been added to the milk, but it is just as it comes from the cow.² The actual product of the cow

¹ The word "food" includes whatever is eaten or drank by man for nourishment; and, therefore, includes milk. Section 1. Commonwealth v. Hartman, 19 Pa. Co. Ct. Rep. 97, 6 Pa. Dist. Rep. 136; State v. Smith, 69 Ohio St. 196, 68 N. E. 1044.

The word "milk" used in a statute in its general sense includes "cream." Commonwealth v. Gordon, 159 Mass. 8, 33 N. E. 709.

"Milk is the secretion of the mammary glands of female mammals for the nourishment of their young. Containing as it does all the requisites for a complete food, i. e. sugar, fat, proteins, and mineral ingredients, combined in appropriate proportion, there is ample reason why it occupies so high a place in the scale of human foods. It is a yellowish white opaque fluid, denser than water, containing in complete solution the sugar, solu-

ble albumin and mineral content, and, in less complete solution, the casein, while the fat globules are held in suspension in the serum, forming an emulsion. The specific gravity of pure milk ranges from one and twenty-seven one-thousandths to one and thirty-five one-thousandths." Leech, Food Inspection, 124.

Eight hundred analyses of cow's milk showed 1.0264 to 1.0370 specific gravity, 80.32 to 90.32 water, 1.79 to 6.29 casein, 0.25 to 1.44 albumin, 2.07 to 6.40 total proteids, 1.67 to 6.47 fat, 2.11 to 6.12 milk sugar, and 0.35 to 1.21 ash. Leech, Food Inspection, 127.

¹ Commonwealth v. Keenan, 139 Mass. 193, 29 N. E. 477; St. Louis v. Ameln (Mo.), 139 S. W. 429.

² People v. Cipperly, 101 N. Y. 634, 4 N. E. 107, 37 Hun 324; State v. Smyth, 14 R. I. 700, 51 Am. Rep. 344; State v. Layton, 160 Mo. 498,

must not be sold as milk if, owing to improper treatment of the animal, it falls so far below the standard that it can not fairly be regarded as milk. Thus a milk seller sold milk which was deficient in fat to the extent of 30 percent. The milk was sold in the same condition as it came from the cow, and the deficiency arose from the fact that the cow had not been milked for sixteen hours, during which period much of the fat was absorbed. The seller was convicted of having sold milk below the standard, the majority of the court expressing an opinion that genuine milk produced by diseased or improperly treated cows ought not to be sold as milk.³ But in a subsequent case, where there was a deficiency of 6½ percent, and the lower court found that it arose from the cow not having been milked for fourteen hours, which was the usual practice in the district, on appeal it was held that the lower court ought to have inquired whether the article sold was of the nature, substance or quality of milk, and that under the circumstances there was no evidence upon which a conviction could be based.⁴ Where

61 S. W. 171, 83 Am. St. 487, 62 L. R. A. 163; *St. Louis v. Liessing*, 190 Mo. 464, 89 S. W. 611, 109 Am. St. 774, 1 L. R. A. (N. S.) 918, note; *People v. Bosch*, 129 N. Y. App. 660, 114 N. Y. Supp. 65.

³ *Smithies v. Bridge* [1902], 2 K. B. 13, 66 J. P. 740, 87 L. T. 167, 50 W. R. 686.

⁴ *Wolfenden v. McCulloch*, 69 J. P. 228, 92 L. T. 857, 20 Cox C. C. 864, 3 L. G. R. 561.

The defendant may show that there has been no physical interference with the milk since it was taken from the cows, though the chemical analysis shows that it contained an excess of fluids. *People v. Salisbury*, 2 N. Y. App. Div., 39, 39 N. Y. Supp. 420. He may also show that in standing over night the solids had separated from the

fluids, and that the sample analyzed was not a fair one, having been drawn from the lower part of the can. *People v. Hodnett*, 68 Hun 341, 22 N. Y. Supp. 809.

"In *Banks v. Wooler* (1900), 64 J. P. 245, 81 L. T. 785, 19 Cox C. C. 432, the defendant had sold milk which contained three and fifty-five one hundredths percent of fat (more than the standard), and seven and forty-six one hundredths percent of other solids (less than the standard), and the analyst certified that ten percent of water had been added. The magistrate said that the milk was exceptionally good, and that the offense was trifling, and dismissed the case. *Channel and Bucknill, J. J.*, said that if the magistrate meant that the milk was exceptionally good after

the standard was "Total milk solids 12.5 percentum by weight; butter fat 3.5 percentum by weight; water 87.5 percentum by weight," it was held that this obviously meant that of the 12.5 percentum milk solids, at least 3.5 percentum should be butter fat, and, so read, the ordinance fixing the standard was not objectionable on the ground that the required standard was a total of 103.5 percentum of ingredients, and was therefore vague, uncertain and contradictory.⁵ Where the standard is fixed, all that is necessary to sustain a conviction is to prove that the milk analyzed fell below that standard.⁶ Where the statute fixed the standard for milk at not less than 3½ percent of butter fat, an offer of the defendant to prove, not that the statute required milk to conform to an impossible standard or test, or that the milk offered for sale should contain constituents that nature did not supply, but that the standard prescribed was unreasonably high, and could not by ordinary care be maintained through all seasons of the year, was held properly rejected by the trial court.⁷ If the milk sold or offered for sale falls below the standard fixed by the statute, proof of that fact is conclusive evidence of a violation of the law.⁸ A statute, however, declaring that milk shown by an analysis to contain more than 88 percent of watery fluids or less than 12 percent of milk solids shall be deemed, for the pur-

the adulteration they were justified in dealing with the case as they did. This does not aver that an offense had not been committed, but merely that it was of such a trifling nature as not to call for the infliction of a fine or costs." *Bell's Sale of Food and Drugs Act* (5th Ed.) 24. See also *St. Louis v. Ameln* (Mo.), 139 S. W. 429.

⁵ *Ex parte Hoffman*, 155 Cal. 114, 99 Pac. 517.

⁶ *State v. Luther*, 20 R. I. 472, 40 Atl. 9.

⁷ *Weigand v. District of Columbia*, 22 App. D. C. 559.

⁸ *People v. Bowen*, 182 N. Y. 1, 74 N. E. 489, reversing 97 N. Y. App. Div. 642, 90 N. Y. Supp. 1108; *St. Louis v. Liessing*, 190 Mo. 464, 89 S. W. 611, 109 Am. Rep. 774, 1 L. R. A. (N. S.) 918.

In such an instance it is not error to charge the jury that the extent and limit of their inquiry is whether the defendant sold or offered for sale the milk as charged, and whether in fact it contained less than the required percent of butter fat. *Weigand v. District of Columbia*, 22 App. D. C. 559.

pose of this Act, adulterated, merely prohibits the sale of milk under a certain standard of quality, and does not operate as a rule of evidence.⁹ "In the absence of any standard fixed by regulation or statute the court may decide for itself what is a fair and reasonable standard of purity or quality, and in general must do so upon the evidence of experts, and if it is shown that the article sold is below such standard, that is evidence that the law has been infringed."¹⁰

§ 531. Article Unknown when Statute Enacted—Condensed Milk.

A statute upon the subject of pure food may cover an article not known at the time of its enactment. Such was an instance of a statute enacted before "condensed milk" or "condensed skimmed milk" was known.¹ But in Massachusetts a different conclusion was arrived at. The charge was that the accused had in his possession with intent to sell "milk to which water had been added." The evidence was to the effect that the defendant, having in its possession 120 quarts of what was called "concentrated milk," had added thereto 360 quarts of ice water, one gallon of heavy cream containing 40 percent of milk fat, and four gallons of "concentrated skimmed milk." The defendant put in evidence the following uncontroverted evidence: "The defendant obtained a license under letters patent of the United States for the production and sale of 'concentrated milk' [in 1908], and built and equipped a factory for that purpose in Vermont. It bought from farmers in that vicinity the best milk obtainable, such as was by test up to or above the standard fixed by the statutes of this [Massachusetts] commonwealth. From this milk it separated the cream, and treated separately the cream and skimmed milk. The cream was treated for some hours to a temperature of not more than 140 de-

⁹ *State v. Newton*, 45 N. J. L. 137; *Roberts v. Leeming*, 69 J. P. 469. 417, 3 L. G. R. 1031.

¹⁰ *Kench v. O'Sullivan*, 10 N. S. W. L. R. 605, 27 W. N. (N. S. W.) 1 *Reiter v. State*, 109 Md. 235, 71 Atl. 975.

greens by means of hot water pipes or jackets applied to the containing tanks, with the result that the cream became pasteurized at a temperature lower than that of ordinary pasteurization, the greater part of its water was evaporated, the bacteria were destroyed, and beneficial changes in it took place, so as to increase the time during which it would remain fresh and sweet, whereby it was purified and yet retained the taste and all the digestive and other qualities of the best fresh cream. The skimmed milk was simultaneously treated in other tanks by a similar application of heat and at the same time agitated and cooled by cold air blasts for about five hours. This brought about the evaporation of at least three-fourths of the contained water, together with all odor from barns or cows, and killed the most of the bacteria in the milk. The original skimmed milk was thus concentrated and reduced to about one-fourth of its original volume and was at the same time purified or pasteurized, but at a low temperature, so that the milk solids were not so far cooked or changed as to make them less digestible or nutritious than in the original milk. The cream and the skimmed milk, thus separately treated, were then in certain proportions carried through pipes into a mixing tank, where they were blended according to a formula, so that the milk solids and the fat should be not less than four times the amount required by our statutes for standard milk and the water should not exceed one-fourth part of that allowed for such standard milk. This final product was the 'concentrated milk' manufactured by the defendant, to which it added three parts of water, with the intention of selling the mixtures thus produced. Qualified experts also testified for the defendant that the chemical changes produced by the process stated were a mild form or incipient stage of curdling or coagulation of the protein of the milk, like that of the white of a soft boiled egg; that there was some precipitation of the sugar and the phosphatic substances, the water and the gases were driven off, and the bacteria were reduced in number from several hundred thousand down to a few hundreds; that the concentrated product was not milk, but

a manufactured product made from milk as a raw material; that the pasteurization process used by the defendant for cream differed from the ordinary pasteurization and the concentration process used for the skimmed milk was different from any method previously known or used for evaporation or condensing milk; and that the defendant's 'concentrated milk' was not a condensed milk such as was previously known in commerce. One of the witnesses testified that whole or natural milk is milk as it is taken from the cow's udder; that the defendant's product was not milk and was not evaporated milk, which is whole or natural milk with the cream in and evaporated, and that it was not the ordinary condensed milk of commerce, but that he would call it 'a mixture of concentrated skim and pasteurized cream.' There was no evidence as to what was generally known or dealt with in the trade as milk. It appears to have been undisputed that the mixture which the defendant intended to sell, being substantially a mixture of the 'concentrated milk' with three parts of water, was fully up to the standard fixed by the statute,² was not adulterated, and had no water or foreign substance added to it, except as has been stated, by the addition of three parts of water to one part of 'concentrated milk'." Upon these facts the Supreme Court of the State held that the "concentrated milk" in question was not "milk" within the meaning of the statute prohibiting the adulteration of milk. "It has been suggested," said the court, "that as there is no dispute that the mixture which the defendant produced by adding water to its 'concentrated milk' did contain water which had not come from the cow, but had been added to the mixture, the mixture itself was within the meaning of the statute milk to which water had been added. But we are unable to accept this argument. If it were sound, then for the same reason one who sold or had in his possession with intent to sell ordinary condensed milk which had been so extended as to resemble natural milk in appearance would be liable to conviction upon a charge like this. When the Legislature

² St. 1908, ch. 643.

dealt with the sale of condensed milk, it used those words.³ It is claimed, to be sure, that the defendant's product is not condensed milk, but it certainly resembles that other manufactured article more closely than it does natural milk. Moreover, the object of our statute regulating the sale of milk, to insure the supply to consumers of a pure, unadulterated article of a certain nutritive value, is not interfered with by what the defendant has done. As we have seen, it is not denied that the diluted or extended mixture which it is intended to sell was fully up to the required standard; it was not claimed that it contained any more water, was of any less nutritive value, or was of less nutritive value, or was less fitted in any respect for a food, than the best natural milk. If, as the evidence tended to show, the process of modified pasteurization to which the manufactured product had been subjected had resulted in greatly diminishing the number of bacteria and in prolonging the time during which the extended mixture could safely be kept, this is neither a reason against its use nor an argument for extending the statutory prohibition so as to include a product which is neither within the common meaning of its words nor, so far as now appears, within the mischief which the statute was designed to prevent."⁴

³ Citing R. L., ch. 56, §§ 59, 63, not the statute under which the defendant was prosecuted.

⁴ *Commonwealth v. Boston White Cross Milk Co.* (Mass.), 95 N. E. 85. "If it should appear in any other case that such a product as this, after having been extended into the form in which it was intended to be sold and used, had been further altered by the addition of water or any other foreign substance, whether by the defendant or by any other person, a different question would be presented. But that is not this case.

So, too, if the use of the defendant's product shall be found to

involve any danger to the public health, or any risk of fraud being practiced by the sale of this manufactured article as milk, the Legislature undoubtedly will make proper provision against such evils. But it is not for us to extend the operation of the present statute beyond its legitimate scope." *Ibid.*

Under the New York Agricultural law, § 37, a contract made and executed in another State for the sale of condensed milk made from skimmed milk may be enforced in New York. *Boston Dairy Co. v. J. H. Jones Corporation*, 129 N. Y. Supp. 70.

§ 532. Adulteration.

Statutes or ordinances upon the subject of adulteration of milk almost universally prescribed what shall constitute adulteration. When that is the case the court can not substitute a definition of its own. Adulteration in its ordinary sense consists in adding some baser or cheaper substance, or extracting some necessary constituent, so that the article adulterated is by reason thereof rendered impure, spurious and inferior.¹ And where a statute declared that food should be deemed adulterated "if any valuable or necessary constituent or ingredient has been wholly or in part abstracted from it," it was held that it did not authorize the conviction of one who, under the description of "skimmed milk," sells milk from which the cream has been taken by separator process, known as the "centrifugal method," though thereby more cream is extracted than by the old-fashioned skimming process.² Where a statute provided that the sale of adulterated milk by adding a substance containing poison was a misdemeanor, and added that food should be deemed adulterated where any substance had been mixed with it so as to lower or injuriously affect its quality or purity, or if any substance had been added which was poisonous or injurious to health, and the provision "or," if it was milk, "if it is the produce of a diseased animal, or diluted with any inferior liquid, or mixing with any inferior substance," was held not to exclude any adulteration of milk under the general provisions of the section.³ Where a statute makes it an offense to sell "adulterated milk" and

¹ Commonwealth v. Hartman, 19 Pa. Cr. Ct. Rep. 97, 6 Pa. Dist. Rep. 136; St. Louis v. Jud (Mo.), 139 S. W. 441.

² Commonwealth v. Hufnal, 185 Pa. 376, 39 Atl. 1052, 42 W. N. C. 78.

³ Lansing v. State, 73 Neb. 124, 102 N. W. 254.

If a statute makes it an offense to put any foreign substance in

food of any kind "in any quantity" for any purpose which is poisonous or injurious to health, putting formaldehyde in milk is an offense, even though the quantity placed in the milk be so small that it is not sufficient to cause death or injury to health. St. Louis v. Wortman, 213 Mo. 131, 112 S. W. 520; Commonwealth v. Wetherbee, 153 Mass. 159, 26 N. E. 414.

defines "adulterated milk" as containing more than a certain percentage of fluids, it is no offense to sell milk from a cow which has more fluids in it in its natural state than that denounced by such a statute.⁴

⁴ *People v. Salisbury*, 2 N. Y. App. Div. 39, 37 N. Y. Supp. 420.

"Milk is an article which varies considerably in composition; the difference arising partly from the breed of the cow, and partly from the way in which the animal is fed and housed. There is also a perceptible difference between the milk given by the same cow at different parts of the year. By the milk Regulations, 1901, a definite standard, of fat three percent and other solids eight and five-tenths percent, has been set up. But it should be observed that milk falling short of the standard is only to be presumed to be adulterated until the contrary is proved, and if a seller of such milk succeeds in proving that the milk was the unaltered product of a cow, he will escape, unless it appears that the cow was unhealthy, improperly fed or improperly milked. However, in practice, it is found very difficult to prove this. Though there is no doubt that individual cows, especially of some foreign breeds, sometimes give milk which fails to come up to the standard. The mixed milk of a herd of healthy cows is almost invariably well above the standard.

The most usual methods of adulterating milk are: (1) the mixing of skimmed or separated milk with whole milk; (2) the addition of water. The first method reduces the percentage of fat and slightly increases the percentage of non-

fatty solids; the second reduces the percentage of fat and also that of non-fatty solids." *Bell's Sale of Food and Drugs Act* (5th Ed.) 241.

"There is a great variation in the composition of milk in different breeds of cattle, and also in different individuals of the same breed. For instance, the Holstein breed of cattle affords a milk with a very low content of fat, sometimes as low as 3.25 percent, and in individual cases lower. On the other hand the Jersey breed of cattle affords a milk of a very high content of fat, sometimes reaching as high as six percent, and in individual cases very much higher. The content of the nitrogenous element in milk is more stable than that of fat and the common content of casein in milk ranges from $2\frac{1}{2}$ to $3\frac{1}{4}$ percent. The sugar in milk is usually the complementary substance with the fat, diminishing in relative proportions as the fat increases and vice versa. The average content of sugar in cow's milk is approximately 4 percent. The content of mineral substances in milk is also quite constant, being about 0.70. The ash contains the phosphoric acid which is one of the essential food components of milk. A milk of fair average quality contains 12 percent of solids and 88 percent of water. This is an expression for milk during the various seasons of the year and from

§ 533. Milk from which any Part of the Cream has been Removed.

If a statute defines adulterated milk as milk from which the cream has been taken, then to remove any part of the cream from milk makes it adulterated milk, although it in other respects complies with the requirements of the law and is in fact wholesome. Thus, where such a statute was

all breeds and kinds of cows. The influence of season has much to do with the quantity of milk produced. It is always greatest in the spring and summer months, when the cows are turned out to pasture and the growths on which they feed are usually succulent. The increase in volume is not attended with a proportionate increase of solids, and thus the percentage of solids in spring and summer milk is less than that in the winter milk unless the cows are particularly well fed during the winter on a generous diet, including large quantities of roots." Wiley, *Foods and Their Adulteration*, p. 169.

Upon hearing a charge of selling adulterated food, the court is entitled to take into consideration facts within their own knowledge as to whether the food has been adulterated. *Shortt v. Robinson*, 63 J. P. 295; *St. Louis v. Ameln* (Mo.), 139 S. W. 429. See also *Regina v. Admiral Field*, 11 T. L. R. 240.

If a statute makes it an offense to sell milk with any foreign substance in it, it is immaterial that such foreign substance is harmless. *Commonwealth v. Schaffner*, 146 Mass. 512, 16 N. E. 280; *St. Louis v. Wortman*, 213 Mo. 131, 112 S. W. 520; *St. Louis v. Ameln* (Mo.),

139 S. W. 429; *St. Louis v. Meyer* (Mo.), 139 S. W. 438; *St. Louis v. Jud* (Mo.), 139 S. W. 441; *St. Louis v. Kruempeler* (Mo.), 139 S. W. 446.

To put annatto in milk is to adulterate it. *St. Louis v. Jud* (Mo.), 139 S. W. 441.

If it be an offense to sell adulterated milk, it is no defense that there was no "intent" to sell such milk. *Commonwealth v. Granstein & Co.* (Mass.), 95 N. E. 97.

"We think that the ordinance proceeds on the notion that, however much the cow waters her own milk in her humble and honest way (letting nature take her course), the milkman has no right to designedly duplicate nature's gift of water by a further gift of his own from the barnyard pump. It proceeds on the underlying theory that it is a fraud, a trick, and a veritable cheat—contrary to the common law, and hence of that phase of it known colloquially as the 'square deal'—to sell water when milk, not water, is the commodity dealt in. If one is not to get a stone who asks for bread, no more (under the spirit of the ordinance) is he to get water who asks for milk." *St. Louis v. Ameln* (Mo.), 139 S. W. 429.

in force, a dealer sold milk in cans, after having taken from them about two quarts of cream and then filling the same with milk from other cans from which the same quantity of cream had been taken, and it was held that he had violated its provisions.¹

§ 534. Skimmed Milk.

An English statute provides that "No person shall sell to the prejudice of the purchaser any article of food or any drug which is not of the nature, substance and quality of the article demanded by such purchaser, under a penalty not exceeding twenty pounds."¹ Under this section a milk dealer was prosecuted for selling skimmed milk as milk. He was acquitted on the ground that skimmed milk is a kind of milk; and this decision was upheld.² Another section of the same statute provides that "no person shall, with the intent that the same may be sold in its altered state without notice, abstract from an article of food any, part of it so as to affect injuriously its quality, substance or nature, and no person shall sell any article so altered without making disclosure of the alteration, under a penalty in each case not exceeding twenty pounds."³ A milk seller was prosecuted under this section for having sold skimmed milk without disclosing that it was skimmed milk. He in fact sold a tin of condensed milk which had upon it a label on which were printed the words, "Condensed Milk, Swiss

¹ *People v. Koster*, 121 N. Y. App. Div. 852, 106 N. Y. Supp. 793.

² *Sale of Food and Drugs Act* 1875, § 6.

³ *Lane v. Collins*, 14 Q. B. Div. 193, 49 J. P. 89, 54 L. J. M. C. 76, 52 L. T. 257, 33 W. R. 365. "The argument was extremely short, no authorities being cited to the court, and the decision does not appear to have been followed in any subsequent case. In *Smithers v.*

Bridge [1902], 2 K. B. 13, 66 J. P. 740, 87 L. T. 167, 50 W. R. 686, Lord Alverstone, C. J. said that *Lane v. Collins* was decided on its own special facts, and that he did not know that he would have agreed with the decision. It is suggested that *Lane v. Collins* can not be regarded as law." *Bell's Sale of Food and Drugs Act* (5th Ed.), p. 24.

³ *Sale of Food and Drugs Act*, 1875, § 9.

Dairy Brand," and in smaller type: "This tin contains skimmed milk." The analysis of the contents of the tin showed a deficiency of 93 percent of butter fat; but though the purchaser's attention had not been called to the words on the label at the time of the sale, the court held that this was a sufficient "disclosure of the alteration" under this section.⁴ A tin of condensed milk was sold as "condensed skimmed milk," 97 percent of the original fat had been abstracted by the use of a separator. It was shown that not more than 63 percent could be abstracted by skimming. The court held that the description "skimmed milk" did not properly describe the alteration; and this decision was affirmed.⁵ The defendant was carrying a milk can in the street of a city, which, on inquiry, he told the purchaser contained new milk, and there were other milk cans in a cart driven by him, some of which he said contained old milk. The purchaser pointed to the can said to contain new milk, and said, "Let me have a pint out of this can." The defendant, after hesitating, said: "That can contains old milk," and then sold a pint of it, which, when examined, showed a result good enough for old milk, but not for new milk. The expression "old milk" was understood in that vicinity to mean milk which has stood for twelve hours, and from which cream has been removed. It was held that he was not guilty of a violation of the statute quoted at the beginning of this section.⁶ A milk dealer was on his rounds when he ran short of milk, and bought a further supply from a dairy-

⁴ Jones v. Davis, 57 J. P. 808, 69 L. T. 497; Platt v. Tyler, 58 J. P. 71.

⁵ Petchey v. Taylor, 62 J. P. 360, 78 L. T. 501, 19 Cox C. C. 38.

⁶ It seems somewhat difficult to reconcile this case with Jones v. Davis, *supra*, in which the facts were very similar, but Wills, J., in his judgment pointed out that in Jones v. Davis no evidence was given to show how much cream

can be abstracted by skimming, and consequently the point upon which the magistrate decided the latter case was never taken." Bell's Sale of Food and Drugs Act (5th Ed.) 42. See Commonwealth v. Hufnal, 4 Pa. Super. Ct. 301, 40 W. N. C. 360, *post*.

⁶ Kirk v. Coates, 16 Q. B. Div. 49, 50 J. P. 148, 55 L. J. M. C. 182, 54 L. T. 178, 34 W. R. 295.

man. An inspector asked him for some "sweet milk." He was going to supply him from what was left of his own milk, but the inspector insisted upon being supplied from the can containing the purchased milk. He told the inspector before purchase that it was not his own milk, and warned him that it might or might not prove to be sweet milk. The milk turned out to be adulterated or skimmed milk. It was held that no offense had been committed.⁷ If a false representation is in fact made at the time of the sale concerning the milk, an offense is committed, even though the purchaser must have known from the price paid that the representation was false. Thus a milkman sold a pint of milk for a penny as new milk, though in fact it was skimmed milk. It was insisted that the purchaser, who well knew the price of milk, must have known from the price that the milk was not new, and that, therefore, no offense had been committed. But the court held that the milkman had violated the statute quoted at the beginning of this section.⁸ Where a statute prohibited the sale of adulterated or impure milk, a sale of "separator skimmed milk" in cans marked simply "skimmed milk," the former product having more of the butter fats removed than the latter, is a violation of such statute.⁹ A section of a statute prohibited the manufacture or sale of condensed or preserved milk unless manufactured from pure and unadulterated milk, from which no part of the cream had been taken, unless the proportion of milk solids should be equivalent to a certain percentage of milk solids in crude milk. Another section provided that milk from which a part of the cream had been taken should be deemed adulterated and unwholesome, but forbade a construction of these two sections so as to prohibit the sale of pure skimmed milk when labeled and sold as such, or the addition of sugar to

⁷ *Frew v. Gunning*, 3 Fraser (J. C.) 51, 3 Adams 339, 38 Sc. L. R. 555. See *Sandys v. Jackson*, 69 J. P. 171, 92 L. T. 646, 3 L. G. R. 285.

⁸ *Heywood v. Whitehead*, 76 L. T. 781.

⁹ *Commonwealth v. Hufnal*, 4 Pa. Super. Ct. 301, 40 W. N. C. 360. But see *Petchey v. Taylor*, *supra*.

the manufacture of condensed milk, and two other sections prescribed the standard for pure milk and a penalty for the violation of the statute. It was held that the primary purpose of the first section was not to prevent fraud, but to prohibit the sale of articles deemed unhealthful by the Legislature, and that the sale of "condensed skimmed milk," an article made from milk from which the cream had been taken, and containing little or no butter fat, was prohibited by the statute, and the fact that such article was unknown or not manufactured when the statute was enacted was immaterial.¹⁰ Under a statute making it an offense to sell adulterated milk and under another statute declaring skimmed milk with less than six percent of cream to be adulterated, selling skimmed milk does not constitute the offense of selling adulterated milk, unless it contains less than six percent of cream.¹¹ Under a statute forbidding the sale of milk "to which water or any foreign substance has been added," a person may be convicted who sells skimmed milk colored by adding to it annatto.¹² Where adulterated milk was defined as milk from which any part of the cream had been removed; and a milk dealer sold milk in cans after having removed from them about two quarts of cream and then filling them with milk from other cans from which the same quantity of cream had been taken, it was held that he was liable to the penalty of the statute, though the milk in other respects complied with the requirements of the law and was in fact wholesome.¹³ Where the experts agree that the milk in question was below the standard, part claiming it was skimmed milk, and part insisting it was merely watered, the jury must determine whether the milk was watered or skimmed.¹⁴ Where the charge was that the defendant

¹⁰ *Reiter v. State*, 109 Md. 235, 71 Atl. 975.

¹¹ *Commonwealth v. Hough*, 1 Pa. Dist. Rep. 51.

¹² *Commonwealth v. Wetherbee*, 153 Mass. 159, 26 N. E. 414.

¹³ *People v. Koster*, 121 N. Y. App. Div. 852, 106 N. Y. Supp. 793.

Sale of milk, from which cream had been removed, to a full cream cheese factory. *People v. Spees*, 18 N. Y. App. Div. 617, 46 N. Y. Supp. 995.

¹⁴ *Seattle v. Erickson*, 55 Wash. 675, 104 Pac. 1128, 25 L. R. A. (N. S.) 1027.

sold adulterated milk containing less than the requisite milk solids, kept, in fact and sold from a can marked "Skimmed Milk," it was held that evidence that the milk was so sold was a good defense, and that the defendant could not be convicted by proof that the milk was watered.¹⁵

§ 535. Condensed, Separated or Skimmed Milk.

An English statute requires "Every tin or other receptacle containing condensed, separated or skimmed milk" to bear a label on which the words "Machine-skimmed Milk" or "Skimmed Milk" are printed. In construing this statute it was held that the words "condensed, separated or skimmed milk" meant condensed separated milk or condensed skimmed milk; and that the statute did not apply to ordinary separated or skimmed milk.¹

§ 536. Buttermilk.

There is very little to be said on the subject of buttermilk. We make the following quotation from an English work: "Buttermilk, which is largely used as an article of diet in some parts of the kingdom, also varies greatly in composition, because a certain amount of water has often to be added to the milk in the process of butter making in order to facilitate the separation of the butter fat, and this quan-

¹⁵ Commonwealth v. Tobias, 141 Mass. 129, 6 N. E. 217.

The United States Department of Agriculture has established a standard for skim milk at "not less than nine and twenty-five one-hundredths percent of milk solids;" but courts can not take judicial knowledge of such standard. St. Louis v. Krumpeler (Mo.), 139 S. W. 446; St. Louis v. Niehaus (Mo.), 139 S. W. 450.

An ordinance establishing a standard for skim milk in total solids, butter fat, specific gravity, freedom from foreign additions of

any kind, and any evidence of decomposition, and which is transported and delivered at a temperature providing for sweet milk, is not in conflict with another ordinance prohibiting persons from having in possession with intent to sell any adulterated milk, and defining additional means of adulteration. St. Louis v. Niehaus (Mo.), 139 S. W. 450; St. Louis v. Meyer (Mo.), 139 S. W. 439.

¹ French v. Card, 73 J. P. 389, 101 L. T. 428. See also Reiter v. State, 109 Md. 235, 71 Atl. 975.

tity varies with the temperature of the air at the time of butter making. But an addition of more than 25 percent of water ought to be regarded as fraudulent, and even 25 percent ought only to be necessary under quite exceptional circumstances."¹ Where a milk dealer was prosecuted for selling butter milk adulterated with 30 percent of added water, and it was proven that the addition of some water was necessary in the process of the manufacture of butter, but that the quantity varied, and depended for the most part upon the state of the temperature, it was held that he was not guilty of the charge of selling adulterated buttermilk under a statute making it an offense to sell an article to the prejudice of the purchaser, the statute especially excusing the dealer "where the food or drug is unavoidably mixed with some extraneous matter in the process of collection or preparation."²

§ 537. Analysis of Milk—Certificate—Evidence.

Statutes frequently provide for an analysis of milk and require a certain method to be pursued in order to ascertain the constituent parts of milk under consideration. Thus in one instance the ordinance forbade exposure for sale of any milk unless it showed on analysis not less than three percent by weight of butter fat, estimated by the Adams paper coil process; and the ordinance was held valid.¹ Where the statute designates the officer who is to make the analysis, his analysis is not conclusive, upon the accused; for if it attempted to make his analysis conclusive, it would be unconstitutional.² In all such instances the accused has a right to show by analysis or other evidence that the milk alleged to be insufficient under the statute was in fact sufficient.³ In

¹ Bell's Sale of Food and Drugs Act 242.

² Warnock v. Johnstone, 8 Rettie (J. C.) 55, 4 Coup. 509.

³ St. Louis v. Bippen, 201 Mo. 528, 100 S. W. 1048, 1049.

² Shivers v. Newton, 45 N. J. L. 469.

³ Hewitt v. Taylor [1896], 1 Q. B. 287, 60 J. P. 311, 65 L. J. M. C. 68, 74 L. T. 51, 44 W. R. 431, 18 Cox C. C. 226; Fyfe v. Cochran, 3 Adam 357, 38 Sc. L. R. 801.

one instance where a statute of this character provided that if milk be shown, upon analysis, to contain more than 88 percentum of watery fluids, or less than 12 percentum of milk solids, it should be deemed, for the purposes of the Act, to be adulterated, it was held that it did not establish a rule of evidence, but defined a new offense.⁴ If the milk does not contain the requisite amount of milk solids, as shown by analysis, then the offense is committed, even though to the milk sold nothing had been added, the intent to cheat being immaterial.⁵ Where the milk tested had stood in the can over night, and, after it was stirred up, a sample was taken out and put into two bottles, one of which was given to the defendant, and the other retained by the State, and the chemical test made by the State showed only 2.61 percent butter fats, while by the Babcock test made by the defendant showed 3.22 percent, these facts were held sufficient to support a verdict for the defendant under an instruction that, if the milk tested by the State was a fair sample of all the milk in the can, then the defendant had sold adulterated milk, and was liable for the penalty sought to be recovered.⁶ A defendant was charged with sending by railway, milk with 22 percent of fat less than natural milk. The analyst's certificate stated that fact, and added, by way of observation, "the abstraction of fat is a fraud." It was held that the certificate need not set out the constitu-

⁴ *State v. Smyth*, 14 R. I. 100, 51 Am. Rep. 344.

Usually it is not necessary to allege in the indictment that there was an analysis which showed that the milk was adulterated. *Commonwealth v. Bowers*, 140 Mass. 483, 5 N. E. 469; *Commonwealth v. Tobias*, 141 Mass. 129, 6 N. E. 217. See also *St. Louis v. Ameln* (Mo.), 139 S. W. 429.

⁵ *People v. Bosch*, 129 N. Y. App. Div. 660, 114 N. Y. Supp. 65; *Commonwealth v. Granstein* (Mass.), 95 N. E. 97.

⁶ *People v. Rickard*, 48 N. Y. App. Div. 408, 63 N. Y. Supp. 165. In this case it was also held that the proof of the test made by the defendant was admissible on the question whether the milk taken from the can by the State was a fair sample of all the milk in the can.

The testimony of the chemist who made the analysis of the milk that he was duly appointed for that purpose is prima facie evidence of his official character. *Vandegrift v. Meihla*, 69 N. J. L. 92, 49 Atl. 16.

ent parts of the sample analyzed where the case is not one of adulteration; it need only state the "result" of the analysis.⁷ One, R, sold milk to H which was stated to be purchased for analysis, and the milk was duly divided into parts as required by a statute, and on analysis the certificate of the analyst, after stating the constituents, said the milk was adulterated with 20 percent of water. R, being charged with selling adulterated milk, the analyst's certificate was given in evidence, and H gave no evidence to contradict it; but the magistrate, thinking that the state of the milk might be explained by its standing several hours in a large can, and the best milk at the top ladled out before the purchase, dismissed the case. This was held error; and as there was no evidence to contradict the certificate of the analyst, he ought to have acted on it, and convicted R.⁸ The defendant may show that the sample analyzed was not a fair one.

⁷ *Bakewell v. Davis* [1894], 1 Q. B. 296, 58 J. P. 228, 63 L. J. M. C. 93, 69 L. T. 832.

⁸ *Harrison v. Richards*, 45 J. P. 552; *Elder v. Dryden*, 72 J. P. 355, 99 L. T. 20, 6 L. G. R. 786. See *Macleod v. O'Neil*, 9 *Rettie* (J. C.) 32.

But upon hearing a charge of selling adulterated food, the court was held entitled to take into consideration facts within its own knowledge as to whether the food had been adulterated. *Short v. Robinson*, 63 J. P. 295. See also *Regina v. Admiral Field*, 11 T. L. R. 240.

In a prosecution under the English Sale of Food and Drugs Act 1875, for selling adulterated milk to a purchaser, the only evidence of adulteration was the certificate of the public analyst, which stated that the sample submitted to him "contained the percentage of for-

eign ingredients as under:—five percent of added water." It was held that the certificate was bad as evidence, under the Act, of adulteration, because it did not state the constituent parts of the sample analyzed. *Fortune v. Hanson*, 1 Q. B. 202.

In another case the public analyst stated that the sample submitted to him contained six percent of added water, and went on to say, "This opinion is based on the fact that the sample contained seven and ninety-seven one-hundredths percent solids not fat, where as genuine milk contains not less than eight and five-tenths percent solid fats." This certificate was held good, although it did not state the constituent parts of the sample analyzed. *Bridge v. Howard*, 1 Q. B. 80, explaining *Fortune v. Hanson*, 1 Q. B. 202.

Such was the case where the milk was deficient in solids, as the analysis showed, when the defendant was permitted to show that it had not been watered or skimmed, or in any way tampered with, but it had stood in the can over night, so that the solids had separated from the fluids, and the sample analyzed was drawn from the lower part of the can.⁹ The jury may disregard the analysis, if they find that it was not made from a fair sample of the milk in question.¹⁰ Adulteration may be shown by the testimony of a witness not an official inspector, or by the testimony of one in fact an official inspector, although no proper record of his analysis has been made.¹¹ The analyst may testify concerning the results given by the instrument used in making the test in question, although no evidence has been offered as to the character of the instrument.¹² Even though the certificate of the analyst be not made evidence of the result of the analysis, yet if it be put in evidence and the analyst then testify to all the facts set forth in the certificate, no reversible error is committed.¹³ Where a statute provided that no evidence of the result of an analysis should be received in complaints for the adulteration of milk, unless at the time a sample of the milk analyzed be set apart and sealed for the case of the seller of the milk, to disprove, if possible, any subsequent charge of adulteration, evidence of an analysis is admissible in a charge for adulteration, though the sample was not given until two hours after the analysis.¹⁴ Where the statute on adulteration provided how milk should be taken and analyzed, and milk was not taken under the provisions of the statute, but was delivered to the inspector by the purchaser for analysis, it was held that the competency of the evidence as to the quality of the milk was to

⁹ *People v. Hodnett*, 68 Hun 341, 22 N. Y. Supp. 809; *People v. Salisbury*, 2 N. Y. App. Div. 39, 37 N. Y. Supp. 420.

¹⁰ *People v. Salisbury*, 2 N. Y. App. Div. 39, 37 N. Y. Supp. 420.

¹¹ *Commonwealth v. Spear*, 143 Mass. 172, 9 N. E. 632.

¹² *Commonwealth v. Nichols*, 10 Allen 199.

¹³ *Commonwealth v. Waite*, 11 Allen 264, 87 Am. Dec. 711.

¹⁴ *Commonwealth v. Kenneon*, 143 Mass. 418, 9 N. E. 761.

be determined by the common law; and the testimony of any person who had sufficient skill to analyze the milk, and who had analyzed some of it, was admissible.¹⁵ When it was shown that a particular foreign substance had been added to milk, it was held that a chemist who had analyzed such milk might testify what the milk was, independently of such foreign substance.¹⁶ Of course, it may always be shown that the analysis was incorrect; and this may be done by evidence of collateral facts.¹⁷ A statute made it an offense to sell or expose for sale or exchange any adulterated milk. In the State where it was in force, a milk vendor had in his wagon two cans, one a 32-gallon can and the other a 10-quart can, which contained about six quarts of milk, from which he was delivering milk to customers at the time he was approached by the State milk inspectors, who thoroughly stirred the milk in the small can, and took from it two samples, one of which was delivered to the vendor, and the other sent to the State chemist. The evidence showed that the samples so taken were adulterated, and this was held to authorize a recovery of the penalty for a violation of the statute. In this instance there was no proof tending to impeach the fairness of the samples or the correctness of the analysis, and it was held that the evidence did not authorize a submission of the fairness of the samples to the jury.¹⁸ If two samples be taken from the same vehicle, and the analyses produced in court, the prosecution is not required to elect between them; but may put in evidence both analyses.¹⁹ In one case evidence of tests of the milk, made a year after the violation of the statute was claimed to have occurred, was held inadmissible.²⁰ Although a stat-

¹⁵ Commonwealth v. Holt, 146 Mass. 38, 14 N. E. 930; People v. Bailey, 136 N. Y. App. Div. 130, 120 N. Y. Supp. 618.

¹⁶ Commonwealth v. Schaffner, 146 Mass. 512, 16 N. E. 280.

¹⁷ State v. Groves, 15 R. I. 208, 2 Atl. 384.

¹⁸ People v. Laesser, 79 N. Y. App. Div. 384, 79 N. Y. Supp. 470.

¹⁹ Commonwealth v. Schaffner, 146 Mass. 512, 16 N. E. 280.

²⁰ Stearns v. Ingraham, 1 Thomp. H. 218.

ute requires milk to contain a certain quantity of fats and solids, yet it is not necessary to show by analysis the milk in question did not contain the requisite quantity, for that fact may be shown in other ways.²¹ Evidence that the defendant's cows were properly fed, if not offered for the purpose of discrediting the analysis of the milk put in by the prosecution, is not admissible.²²

§ 538. Decomposition of Milk Samples.

Except in a limited number of exceptional cases, hereafter referred to, there is no practical difficulty in accurately ascertaining the composition of the milk when fresh, from the analysis of the milk when sour.

²¹ *Copland v. Boston Dairy Co.*, 189 Mass. 342, 75 N. E. 704.

²² *State v. Campbell*, 64 N. H. 402, 13 Atl. 585.

Section 1 of a statute made it an offense to sell adulterated milk. Section 2 punished any one selling skimmed milk, but provided that skimmed milk might be sold if on the vessel or can containing it the words "skimmed milk" was printed. Section 4 provided that milk which contained less than twelve and one-half percent of milk solids and less than three percent of fats should be deemed adulterated, and skimmed milk with less than six percent of cream and two and one-half percent of fats was also to be deemed adulterated. It was held that a sale of skimmed milk from unmarked cans was not a sale of adulterated milk, and therefore not within Section 1, unless it was shown to have contained less than six percent of cream and two and one-half percent of fats. *Commonwealth v. Hough*, 1 Pa. Dist. Rep. 51.

Where an individual, by direction of the dairy commissioner, went to a city and made complaint against a vendor of milk, based upon a certificate of an analysis of a certain quantity of milk sold by him showing it to be adulterated, it was held that there was probable cause for the prosecution, such a certificate, in the absence of information or belief to the contrary, justifying an officer making a complaint, in view of a statute making the certificate prima facie evidence of adulteration, and the statute requiring the dairy and food commissioners to analyze dairy and food products. *Birdsoll v. Smith*, 158 Mich. 990, 122 N. W. 626, 16 Detroit Leg. N. 648.

Orally informing the dealer of the result of the analysis is enough to inform him of the quality of his milk, although the statute required the inspector to give him a written statement of the analysis. *Commonwealth v. McCance*, 176 Mass. 292, 57 N. E. 603.

“The change which takes place in a sample of milk kept from contact with air, as in a bottle nearly full of the sample, and fitted with a good sound cork sealed with wax, is, as a rule, comparatively slight. The causes and nature of this change have been carefully studied by many observers, and they have been found to be perfectly definite in character. Without going into details concerning the fermentative changes to which milk is liable, it may be stated that the changes which affect the analysis, and, therefore, the inference to be drawn from the results, are concerned with the nonfatty solids only, and more particularly with the milk-sugar. The milk-sugar gives rise, either proximately or remotely, to a variety of products, the most important of which are lactic acid, ethyl alcohol, and acetic acid; but it can be shown that the only quantitative determinations which need to be made in order to determine the loss in the nonfatty matter by keeping are the proportion of alcohol, reckoned as proof-spirit, and the amount of free volatile acid, together with the ammonia derived from the alteration of the casein, or proteid substance, in the milk. The slight alterations in weight consequent on the hydrolysis and conversion of lactose into lactic acid, and the formation of certain so-called by-products of alcoholic fermentation, are partly positive and partly negative in direction, but their joint effect is too small to have any appreciable influence on the result.

“The entire correction, which, of course, is always additive, in the case of a properly preserved sample from three to six weeks old is fairly constant, and may be said to range from 0.2 to 0.3 percent. In a few cases it has been found to be as low as 0.1 percent, and in very exceptional cases, as in badly secured samples, or in bottles only partially filled, it has risen to 0.7 or 0.8 percent.”

“If the fermentation has passed into the butyric acid stage, the amount of free acid is greatly increased, and owing to the separated casein it is sometimes impossible to get the sample into a proper and uniform condition of analysis. In such cases the government laboratory declines to proceed

with the examination. Such a result, however, practically never happens in the case of samples which have been properly taken and kept by the inspectors pending the appeal to the government laboratory.

"The following tables give the results of the analysis of a series of milks analyzed in the fresh state and after the lapse of several weeks. The examination was carried beyond the time at which a milk would be referred to the government laboratory under the Food and Drugs Act, but it will be seen that the changes can be accurately followed and allowed for. The comparison of the corrected nonfatty solids with the solids of fresh milk shows that the variations are not greater than may occur in duplicate determinations of the constituents of a fresh milk."¹

WHOLE MILKS.

No.	FRESH MILK		KEPT MILK			TOTAL LOSS	
	Non-fatty solids	Fat	Time in Days	Non-fatty solids	Fat	Calculated	Actual
(1)	8.97	4.08	21	8.71	4.02	.20	.26
(1A)	8.97	4.08	27	8.74	3.97	.21	.23
1(B)	8.97	4.08	50	8.61	4.00	.34	.36
(1)	8.97	4.08	85	8.49	4.09	.49	.48
2	8.99	3.17	27	8.60	3.16	.35	.39
3	9.12	4.16	42	8.82	4.18	.33	.30
3A	9.12	4.16	102	8.88	4.18	.25	.24
4	9.02	4.72	41	8.56	4.65	.58	.46
5	9.02	3.28	52	8.76	3.25	.20	.26
5A	9.02	3.28	79	8.53	3.34	.49	.49
5B	9.02	3.28	93	8.35	3.27	.61	.67
6	9.13	4.49	57	8.88	4.35	.23	.25
8	9.52	4.06	74	9.25	3.92	.35	.27
9	9.27	4.07	77	8.91	4.06	.32	.32
10	9.10	4.19	91	8.24	4.14	.76	.87
11	9.34	4.07	91	9.01	4.01	.41	.33
12	8.42	3.70	91	8.14	3.69	.26	.28
13	8.83	5.32	91	8.56	5.20	.31	.27
14	9.20	3.98	91	8.80	3.83	.39	.40

¹ Bell's Sale of Food and Drugs Act, 214.

**MILKS TO WHICH APPROXIMATELY 10 PERCENT OF WATER HAS BEEN
ADDED**

	FRESH MILK		KEPT MILK			TOTAL LOSS	
No.	Non-fatty solids	Fat	Time in days	Non-fatty solids	Fat	Calculated	Actual
1	8.14	3.44	14	7.96	3.41	.27	.18
(2)	8.14	3.44	30	7.81	3.40	.42	.33
3	8.24	2.79	38	7.88	2.78	.33	.36
4	8.24	2.79	38	7.73	2.76	.50	.51

SEPARATED MILKS.

	FRESH MILK		KEPT MILK			TOTAL LOSS	
No.	Total solids	Fat	Time in days	Total solids	Fat	Calculated	Actual
1	9.66	.14	27	9.25	Not determined	.22	.41
1A	9.66	.14	36	9.34		.13	.32
1B	9.66	.14	65	9.35		.26	.31
2	8.91	.09	28	8.62		.28	.29
2B	8.91	.09	37	8.60		.20	.31
3	8.61	.13	30	8.33		.24	.28
3A	8.61	.13	37	8.29		.28	.32
3B	8.61	.13	91	7.93		.58	.68

**SEPARATED MILKS TO WHICH APPROXIMATELY 10 PERCENT OF WATER
WAS ADDED.**

	FRESH MILK		KEPT MILK			TOTAL LOSS	
No.	Total solids	Fat	Time in days	Total solids	Fat	Calculated	Actual
1	8.18	21	7.86	Not determined	.24	.32
1A	8.18	387	6.71		1.50	1.47
1B	8.18	388	6.64		1.56	1.54
1C	8.18	401	6.71		1.50	1.47
2	7.67	22	7.22		.33	.45
2A	7.67	387	6.24		1.49	1.43
3	7.76	73	7.11		.55	.65
4	7.80	185	6.22		1.59	1.58
4A	7.80	188	6.19		1.69	1.61

§ 539. Preservatives in Milk.

Preservatives in milk, according to most authorities, are wholly unnecessary, and should not be permitted even in the smallest quantities. Annatto, or some other harmless coloring matter, is very commonly used, and the addition of such coloring substance is not, as a rule, complained of; but its object is to conceal inferior quality. Under the influence of preservatives milk may be exposed without sensible injury to conditions which otherwise would render it unsaleable. It may remain sweet to taste and smell and yet have incorporated in it disease germs of various kinds, whose activity may be suspended for a time by the action of the preservative, but may be renewed before the milk is digested. After hearing evidence from milk traders, the English Departmental Committee on Preservatives and Coloring Matters in Food concluded that the addition of a preservative to milk is not necessary for the purpose of the milk trade, even in hot weather or where the supply of so large a place as London is concerned, and they recommended that no preservatives should be added to milk. "In making this recommendation the committee had special regard to evidence received as to two classes of preservative substances which, under various names, are frequently used as preservatives in milk, viz.: (1) formalin (a 40 percent solution of formic aldehyde) and other preparations of formic aldehyde; and (2) boron preservatives (boric acid, borax, or mixtures of boric acid and borax). The committee considered that the addition to milk of formalin or preparations of formalin, even when the amount which could be detected was minute, was objectionable, on account of the alterations effected by formalin in the character of certain of the constituents of milk and of its ability to interfere directly with digestive processes. Although in the view of the committee boron preservatives might reasonably be employed in the case of certain foods, within defined limits and subject to a declaration as to their presence and amount, the committee recommended their exclusion from milk alto-

gether; partly for the reasons above indicated, and partly also in consideration of the immense importance of pure milk for the nutrition of infants, invalids and convalescents, and of the comparatively large quantity of milk which may be taken, particularly by children, in comparison with the other foods in question. Moreover, the committee had evidence 'pointing to an injurious effect of boracised milk upon the health of very young children.' Since the report of the committee was made, the board have from time to time had before them further evidence on the subject, and this supports the conclusions of the committee not only as to the objections to the use of preservatives on the ground of public health, but also as to the ability of milk traders to conduct their business without the use of preservatives. Thus in certain boroughs in London and elsewhere in which milk samples are systematically tested for preservatives, the presence of preservatives in milk, at any time of the year, has been found to be exceptional; and there is evidence to show that a very large number of milk vendors conduct their business without the use of these substances, even where the milk comes long distances by rail."¹ To put formaldehyde in milk and offer it for sale is to violate a statute making it an offense to fraudulently adulterate, for the purpose of sale, any substance intended for food with any substance injurious to health, where the evidence shows that formaldehyde is injurious to the health of an individual using milk thus adulterated.² And where a statute makes it an offense

¹ Bell's Sale of Food and Drugs Act (5th Ed.) 221.

"As regards formalin and boron preservatives, the Board are advised that the presence in milk of formalin to an amount which is ascertained by examination within three days of collecting the sample to exceed 1 part in 40,000 (1 part of 100,000 of formic aldehyde) raises a strong presumption that the article had been rendered injurious to health, and that the pur-

chaser has been prejudiced, in the above sense [to an extent that would justify the institution of proceedings for a violation of the statute], and also that a similar presumption is raised where boron preservatives are present in milk to an amount exceeding forty grains of boric acid per gallon." Bell's Sale of Food and Drugs Act (5th Ed.) 224.

² Isenhour v. State, 157 Ind. 517, 62 N. E. 40, 87 Am. St. 228; St.

to "mix . . . any article of food with any ingredient or material so as to render the article injurious to health," it is not necessary that the article put into milk should be injurious to the health of everybody. Thus where cream, an article likely to be consumed by infants and invalids, was mixed with boric acid in a proportion harmless to healthy adults but injurious to infants and invalids, it was held that the defendant had been rightly convicted.³

§ 540. Instances of Violations of Statutes Concerning Milk.

A statute relative to the adulteration of milk, that each manufacturer of cheese or butter shall post a copy of the Act in the receiving room of his factory is directory only; and in a prosecution relative to a sale of such milk to a manufactory to be manufactured into cheese, it is no defense that the manufacturer did not post in the receiving room of his factory a copy of such Act.¹ A statute making it unlawful to sell milk until the seller should appear before the clerk of the county court, and take oath not to adulterate with any substance whatever the milk offered for sale, is not complied with by an oath not to adulterate the milk offered for sale with any poisonous substance.² A statute

Louis v. Wortman, 213 Mo. 131, 112 S. W. 520.

The Rhode Island Gen. Laws, ch. 282, § 1, prohibiting the sale of any kind of diseased, corrupted, adulterated, or unwholesome provisions, whether for meat or drink, has no application to the sale of adulterated milk. State v. Luther, 20 R. I. 472, 40 Atl. 9.

Minnesota statute of 1899, ch. 257 construed in its application. State v. Rumberg, 86 Minn. 399, 90 N. W. 1055.

³ Cullen v. McNair, 72 J. P. 376, 99 L. T. 358, 24 T. L. R. 692, 6 L. G. R. 753.

Where the charge was putting formaldehyde in milk, the exclusion

of evidence that neither the defendant nor any of his family or employes, put in formaldehyde, and that he had none on his premises, and that the milk was delivered just as it came from the cows, was held to constitute reversible error, as such evidence would tend to show that no such addition had in fact been made. People v. Bowen, 182 N. Y. 1, 74 N. E. 489, 97 N. Y. App. Div. 642, 90 N. Y. Supp. 1108.

¹ Bainbridge v. State, 30 Ohio St. 264.

² Hall v. State, 9 Lea 574, a case of mixing and adulterating liquors.

The Illinois Act of March 9,

declaring that "no person either by his servant or agent, or as the servant or agent of another," shall sell adulterated milk does not make it an offense for the principal to sell it.³ A statute making it an offense to have in one's possession with intent to sell "milk" to which a foreign substance has been added, is violated by having in possession cream, with intent to sell it, to which boracic acid has been added; for the word "milk" being used as a general term is broad enough to include cream.⁴ If a statute makes it an offense to sell milk to which water or any foreign substance has been added, it is immaterial whether coloring matter put into milk is injurious or not, the addition of the foreign substance being an offense;⁵ and under a statute making it an offense to place any foreign substance in food of any kind "in any quantity" for any purpose which is poisonous or injurious to health, it is a violation of the statute to put formaldehyde in milk, though the quantity put in it be so small that it is not sufficient to cause death or injury to health.⁶ So to put annatto in milk, though harmless, is a violation of a statute making it an offense to sell milk "to which water or any foreign substance has been added, even though the milk colored with it be skimmed milk."⁷ A statute providing that no adulterated milk "shall be brought into, held, kept, or offered for sale at any place in the city" does not prohibit the mere possession of milk.⁸

1869, entitled "An Act to protect butter and cheese manufacturers," applied only to factories conducted upon a joint or co-operative plan. *Phillips v. Mead*, 75 Ill. 334.

³ *State v. Squibb*, 170 Ind. 488, 84 N. E. 969.

⁴ *Commonwealth v. Gordon*, 159 Mass. 8, 33 N. E. 709.

⁵ *Commonwealth v. Schaffner*, 146 Mass. 512, 16 N. E. 280.

⁶ *St. Louis v. Wortman*, 213 Mo. 131, 112 S. W. 520; *St. Louis v. Polinsky*, 190 Mo. 516, 89 S. W. 625; *St. Louis v. Jud* (Mo.), 139 S. W.

441. The "adding annatto, whether harmful or not, in order to give milk the rich and golden color of milk from cows fed on green food, was a deception and a fraud upon milk users, and on honest competitors." *St. Louis v. Jud*, *supra*.

⁷ *Commonwealth v. Wetherbee*, 153 Mass. 159, 26 N. E. 414; *St. Louis v. Jud* (Mo.), 139 S. W. 441.

⁸ *People v. Timmerman*, 179 N. Y. 550, 71 N. E. 1136, affirming 79 N. Y. App. Div. 565, 80 N. Y. Supp. 285. See also *People v. Wright*, 19 N. Y. Misc. Rep. 135,

Where a statute made it an offense for a milk dealer to have in his possession for the purpose of sale any adulterated milk, a dealer was held to have violated its provisions where he had in his possession with such an intent seventeen cans of milk, six of which were below the statutory standard, though the average of the seventeen cans was above the standard.⁹ An agent selling adulterated milk violates the statute the same as if the milk were his own.¹⁰ The possession of adulterated milk by a servant is the possession of the master.¹¹ The owner of a restaurant is liable to a penalty if a waiter therein, in the ordinary course of his business, supplies a customer with a glass of adulterated milk.¹² It is as much an offense to sell milk unknowingly and accidentally adulterated as it is to sell milk purposely adulterated by the vendor.¹³

43 N. Y. Supp. 290; *People v. Kellina*, 23 N. Y. Misc. Rep. 134, 50 N. Y. Supp. 653; *People v. McDermott-Bulger Dairy Co.*, 38 N. Y. Misc. Rep. 265, 77 N. Y. Supp. 888.

⁹ *Splinter v. State*, 140 Wis. 567, 123 N. W. 97.

¹⁰ *Meyer v. State* (Ohio), 43 N. E. 164.

¹¹ *Commonwealth v. Proctor*, 165 Mass. 38, 42 N. E. 335; *Commonwealth v. Warren*, 160 Mass. 533, 36 N. E. 308.

¹² *Commonwealth v. Vieth*, 155 Mass. 442, 29 N. E. 577.

¹³ *Commonwealth v. Granstein* (Mass.), 95 N. E. 97; *People v. Friedman*, 138 N. Y. App. 122, 122 N. Y. Supp. 500; affirmed 200 N. Y. 591, 94 N. E. 1096.

"The housekeeper who buys milk for her table or children should be protected from adroit tricks, cheating her judgment by deceiving her eyes. Peradventure, golden hued milk speaks of cows brouzing in dewy meadow grass. It harps back

to blue grass and clover, with a sprinkle of buttercups and daisies, not to annatto or any other dye. If such good woman wants annatto in her milk, the policy of the State is to let her put it in herself. Fireside lore and philosophy connect rich yellow milk with the food of the cow, not with an artificial dye like annatto. Witness the chimney corner adages: Barley straw is good fodder when the cow gives water. It is the head of the cow gives milk. The cow gives milk through her mouth (i. e. as she is fed." *St. Louis v. Jud* (Mo.), 139 S. W. 441.

A complaint for violating a city milk ordinance prohibiting the possession of adulterated milk with intent to sell it, charging that on a specified day and place, the defendant had in his possession, with intent to sell, adulterated milk, is sufficient, under the rule that it is generally sufficient to charge the offense in the language of the ordi-

§ 541. Milk in Bottles—Size of Bottles, Designating.

An ordinance requiring dealers selling cream and milk in bottles or glass jars to have the capacity of the bottles or jars permanently indicated on them, and prescribing a penalty for having within their possession bottles or glass jars of a capacity less than that indicated on the outside, or which do not indicate their capacity, is valid, being within the police power of the city; and it is not invalid as special legislation, since it applies generally to all persons of the class who sell milk in bottles or glass jars in the city. Proof that a cream or milk dealer had in his possession bottles for use in the business, which were of less capacity than that indicated on their outside, is sufficient to show a violation of the ordinance; and it is no defense that the dealer did not have knowledge that his bottles did not meet the requirements of the ordinance.¹

§ 542. Dealer in Milk.

A statute providing that no dealer in milk shall sell, ex-nance with such certainty as to time, place, and manner as to reasonably notify the defendant of the charge preferred. *St. Louis v. Ameln* (Mo.), 139 S. W. 429.

A statute referred to a series of enumerated and interdicted kinds of milk, each connected with the other by the disjunctive conjunction "or," and solely related to the selling, offering, or exposing for sale any milk or cream of the several kinds described, provided that whoever sold or offered or exposed for sale within the State any milk of the kinds specified, or sold or offered for sale, or delivered to another, adulterated or unwholesome milk, should be guilty of a misdemeanor. The phrase "injurious to health" was used in connection with milk sold, offered or

exposed for sale containing foreign substances or preservatives of any kind. Another statute provided that food should be deemed adulterated if any substance was mixed with it, so as to lower or depreciate or injuriously affect its strength, quality, or purity. It was held that these sections must be read together, and when so read they prohibited the sale of offering for sale within the State of milk, the quality of which had been reduced by adding pure water, and that it was not the policy of the State to permit the sale of watered milk, so long as a specified standard was retained. *State v. Ameln* (Mo.), 139 S. W. 429.

¹ *Chicago v. Bowman Dairy Co.*, 234 Ill. 294, 84 N. E. 913, 123 Am. St. 100, 17 L. R. A. (N. S.) 684.

change, or deliver, or have in his custody or possession with intent to sell, milk from which the cream or any part of it had been removed, unless in a conspicuous place on the vessel from which the milk is sold is placed the words "skimmed milk" distinctly marked, applies to a person who sells milk obtained from his own cows as well as one who buys and sells milk.¹

§ 543. Contract for Adulterated Milk.

Where the charge is a sale of adulterated milk, it is no defense for the defendant that he delivered the milk under a special contract to furnish the complainant with milk at the dairy, if, as a matter of fact, the milk was not of the quality required by the statute.¹ In an action to recover the price of milk sold, it is no objection that the contract was impaired by a statute declaring it to be unlawful to sell watered or adulterated milk, in that the defendant had an opportunity to examine the milk, and accepted it. In such an instance the defense is based on the rule of law that a person may not found his cause of action on his own violation of a prohibitive statute.²

§ 544. Conflict between Milk Ordinances and Statute.

A statute provided that whoever sold or offered or exposed for sale within the State any milk, or sold or offered for sale, or delivered to another adulterated or unwholesome milk, should be guilty of a misdemeanor; and an ordinance of a city of such State provided that no person within such city should have in his possession with intent to sell, any adulterated milk, and prescribed what should constitute adulteration. It was held that as the statute was silent with reference to "possession with intent to sell," which was

¹ *Guilder v. State*, 26 Ohio Cir. Ct. Rep. 221.

A complaint charging a violation of a statute which provides that "no person" shall sell adulterated milk, need not allege that the defendant was a registered milk

dealer. *State v. Luther*, 20 R. I. 472, 40 Atl. 9.

² *Commonwealth v. Holt*, 146 Mass. 38, 14 N. E. 930.

³ *Hecht v. Wright*, 31 Colo. 117, 72 Pac. 48.

made an offense by the ordinance, the two were not in conflict as to such offense.¹ An ordinance prohibited the sale of milk containing less than 8.5 percent nonfatty solids; and a statute of the State required milk sold within the of milk containing less than 8.5 percent nonfatty solids; or 0.70 percent more than the ordinance required. It was held that the ordinance was not invalid because it provided a different standard for milk sold within the city, under the rule that, so long as the city ordinance, within the grant of municipal legislative power, falls within, but does not exceed, and is not inconsistent with, the State statute, there is no such conflict or inconsistency as to invalidate the ordinance. Such ordinance did not authorize a sale of milk within the city which violated the State law, but was a mere exercise of a proper municipal discretion not to bring the machinery of the city courts and city laws into operation to prosecute for violations in excess of the municipal standard, leaving the State to enforce its own law at all points and to the limit prescribed. Such ordinance was not void on the ground that it was against the policy of the State. Nor was it void on the theory that the inhabitants of the city were entitled to the same grade of milk to which the other inhabitants of the State were entitled, since the ordinance prohibited the having in possession impoverished milk within the city, with intent to sell it, without reference to whether the possessor was a resident or non-resident, and did not affect the application of the State law within the city. Nor was the ordinance repealed by the statute, either expressly or by implication.¹ An ordinance providing a standard for salable skim milk, with reference to fatty and nonfatty solids, and containing no provision with reference to adulteration by the addition of water or otherwise, is not in conflict with another ordinance which prohibits the having in possession, with intent to sell, any milk adulterated by mixing with any substance so as to lower or depreciate its strength. So an ordinance prohibiting the possession of adulterated milk with intent to sell is

¹ St. Louis v. Ameln (Mo.), 139 S. W. 429.

¹ St. Louis v. Scheer (Mo.), 139 S. W. 434.

not in conflict with another ordinance prohibiting the traffic in milk containing a substance which is poisonous or injurious to health, but each supplement the other. So a statute prohibiting the sale or offering for sale of milk adulterated with water or any other substances, or any milk produced from diseased cows is not in conflict with an ordinance prohibiting the "possession" of adulterated milk with intent to sell it.² The word "adulterated" as used in a statute providing that it shall be a misdemeanor to sell or offer for sale any milk containing any foreign substance or preservative injurious to health, or shall sell or offer for sale any unclean, "adulterated," or unwholesome milk, is used in the sense ordinarily given by lexicographers, which is the addition of a foreign matter to change or improve the appearance or flavor of an article; and such statute is not in conflict with an ordinance prohibiting the having in possession adulterated milk, with the intent to sell it, and providing that it should be deemed adulterated if any substance was mixed with it, so as to lower or depreciate or injuriously affect its strength, quality, or purity, or if it was mixed or colored, so that inferiority was concealed, or if it was made to appear better than it really was, on the theory that the statute permitted the addition of coloring matter which was not harmful.³

² *St. Louis v. Meyer* (Mo.), 139 S. W. 438; *St. Louis v. Schulte* (Mo.), 139 S. W. 449.

³ *St. Louis v. Jud* (Mo.), 139 S. W. 441; *St. Louis v. Kruempeler* (Mo.), 139 S. W. 446; *St. Louis v. Niehaus* (Mo.), 139 S. W. 450.

A municipal code provided that no special or general ordinance which was in conflict or inconsistent with general ordinance of prior date should be valid or effectual until such prior ordinance, or its conflicting parts should be repealed by "express terms." An ordinance of a city acting under this code, relating to the sale and

custody of skimmed milk, was "amended by striking it out" and inserting in lieu thereof a new section bearing the same number, and providing a new standard for skimmed milk to be sold within the city. It was held that the term "strike out" as so used meant to "force out," to "blot out," "to efface," "to erase," and as so construed connected itself with the statutory definition of repeal, and hence there was a repeal of the section amended by express terms. *St. Louis v. Kellman* (Mo.), 139 S. W. 443.

CHAPTER XIII.

LABELS—MARKS—NOTICE.

SEC.	SEC.
545. Statutes concerning labels, marks and notices.	tice on label—Otherwise notified.
546. Label, popular understanding of name used on—Sausage.	553. Sale of food in altered state—Disclosure of alteration—Knowledge of alteration.
547. Oral statement.	554. False representations made before sale at variance with label.
548. The package to be labeled.	555. Fraudulent false label.
549. Wrapper, marking.	556. Instance of proper and deficient labels.
550. Notice on label must be clear and truthful.	557. Brands.
551. Mixture—Sufficiency of labels on can of condensed milk.	
552. Seller calling attention to no-	

§ 545. Statutes Concerning Labels, Marks and Notices.

In many instances foods or drugs are required to be labeled, distinctly stating thereon the constituent elements thereof. In a number of statutes where this is done permission is given to sell the food labeled, although it is not up to the standard required. Where such a statute prevails it is no defense that the article is sold in the same state or condition as when it was received from the manufacturer. As a rule popular names must be used on the labels—such as the general public commonly use and understand—and not technical ones. Not infrequently the size of the letters to be used in the label are specified. In the case of oleomargarine the letters are usually required to be of large size. Such is the case of the English statute of 1899, where the paper wrapper in which oleomargarine is sold must be “capital black letters, not less than half an inch long and distinctly legible, and no other printed matter.”¹

¹ 62 and 63 Vict., ch. 51, § 6.

By one section of a statute ev-

ery person manufacturing or selling any substance made in the sam-

**§ 546. Label, Popular Understanding of Name Used On—
Sausage.**

Where a statute requires the contents of a package to be stated in the label attached to it, when it is to be sold to the general public, the popular or common understanding of the name under which it is sold, and not its trade or commercial meaning, is to be used. As the pure food statutes are enacted to protect the purchasers of food, to permit the use of scientific terms and names, or trade and commercial terms, and names which are unknown or known only to a few of those who purchase it for consumption, would be to practically nullify the effect of the statute so far as a protection to those who buy it. The object of such statute is to protect those who purchase and consume the food. "Courts will take cognizance of the well-known fact that farmers, laboring men and consumers are not generally familiar with the customs of trade and commerce in importing goods, or of understandings of the trade between manufacturers and merchants who buy those products for retail trade. Such constructions (the use of trade and commercial names) would emasculate the pure food laws and deprive the people of the protection which the Legislature wisely intended to give them."¹ Thus, where it was the practice to use cereal meal in sausage, it was held that the label should be "sausage and cereal," and not merely "sausage," although the trade recognized that

blance of lard must cause the package containing it to be labeled "Lard Substitute." By another section it was enacted that the first section should not apply to cottolene where the package was labeled "Cottolene," if the cottolene was not manufactured in imitation of lard. It was held that these sections forbade the sale of cottolene which was manufactured so as to resemble lard, unless the package containing it was labeled "Lard Substitute." *State v. Hanson*, 84

Minn. 42, 86 N. W. 768, 54 L. R. A. 468.

¹ *Armour & Co. v. Bird*, 159 Mich. 1, 123 N. W. 580, 25 L. R. A. (N. S.) 616, note.

The statute in this instance required a label to be placed on mixtures or compounds; mixture or compound had to be "distinctly labeled under its own distinctive name, and in a manner so as to plainly and correctly show that it was a mixture or compound.

sausage contained cereal; but it was not necessary for it to contain a statement that salt, spices and water was also a component part of it. "It is too manifest for further argument that the Legislature, in enacting the law, was not providing for the regulation of sales between manufacturers and merchants, but between retail dealers and consumers. They enacted the law solely for the protection of consumers—the people who buy and eat the products. The consumer who prefers sausage made of meat alone is entitled to be informed that he is buying such an article. The consumer who prefers sausage mixed with cereal is entitled to know he is purchasing that article. The contention of the complainant,² if sustained, would deprive the consumer of this right which the statute plainly gives him."³

§ 547. Oral Statement.

An oral statement made to the purchaser can not take the place of a label where it is an offense to sell a package required to be labeled.¹

§ 548. The Package to be Labeled.

An English statute requires every "package" to be labeled. Under this statute it was held that a tub of margarine standing at the back of the counter, from which margarine was scooped and supplied to customers in a "package," must be labeled.¹ In another case margarine had been exposed for sale by retail in an open butt branded "margarine" on the bottom and side, from which it was scooped as required by customers. It was held that the butt was a "parcel" to which a label ought to have been attached.² In another case

² That the use of the word "sausage" was sufficient compliance with the statute.

³ *Armour & Co. v. Bird*, 159 Mich. 1, 123 N. W. 580, 25 L. R. A. (N. S.) 616.

¹ *People v. Waters*, 188 N. Y. 632, 81 N. E. 1171, affirming 114

N. Y. App. Div. 669, 100 N. Y. Supp. 177.

¹ *McNair v. Horan*, 68 J. P. 518, 91 L. T. 555, 20 Cox C. C. 729, 2 L. G. R. 1239.

² *Maguire v. Porter* [1905], 2 Irish Rep. 147.

six pieces of margarine of one pound each, and each partly wrapped in paper, were piled upon each other in a pyramid in a shop window. One margarine label was put upon the whole heap (on the bottom pieces). An inspector bought the top piece. It was held that the six pieces formed one "parcel."³ Where a statute required articles to be labeled, a dealer was held to commit no offense in taking small amounts from a properly labeled and ordinary sized package, put up for commercial use, and selling them without a label—e. g., a pound of lard from a fifty-pound pail.⁴ A New York statute required packages of renovated butter to be labeled. If it was put up, sold, or offered for sale in prints or rolls, then the prints or rolls had to be plainly labeled on the wrapper with the words "renovated butter." If packed in tubs, boxes, pails, or other kind of case or package, these words had to be printed thereon, so as to be plainly seen by the purchaser; and if the butter be exposed for sale uncovered, not in packages or cases, the label had to be attached to the mass of the butter so as to be easily seen by the purchaser. This statute was held to have for its object the prevention of imposition on the purchaser, and was not violated where the seller took a pound of butter from a tub in a cooler and wrapped it in a paper not branded, the tub being branded, and the purchaser knowing this before he paid for the butter, and there being no attempt to deceive such purchaser.⁵ Under the food law of Nebraska the word "package" does not apply to a ham or side of bacon whose form, size and weights are determined by the size, weight and condition of the slaughtered animal; but it does apply to articles of food that are packed, bound, or put together in sizes determined by the manufacturer and intended to pass as weighing one pound or more.⁶

³ *Parkinson v. McNair*, 69 J. P. 399, 93 L. T. 553, 21 Cox C. C. 42, 3 L. G. R. 982. See also *Wheat v. Brown* [1892], 1 Q. B. 418, 56 J. P. 153, 61 L. J. M. C. 94, 66 L. T. 464, 40 W. R. 462.

⁴ *State v. Neslund*, 141 Iowa 461, 120 N. W. 107.

⁵ *People v. Mack*, 97 N. Y. App. Div. 474, 89 N. Y. Supp. 1004.

⁶ *State v. Swift & Co.*, 84 Neb. 244, 120 N. W. 1127.

§ 549. Wrapper, Marking.

An English statute required the seller of margarine by retail, unless in a package duly branded or durably marked, to deliver it "to the purchaser in a paper wrapper on which must be printed in capital letters the word "margarine." Under this statute the question has arisen as to whether the wrapper referred to must be the outside wrapper or not. In one case the margarine was sold in wrappers duly marked "margarine," but before delivery to the purchaser a second wrapper was put on which concealed the first one. This was held to be no infringement of this statute.¹ But in a later case, although the point did not actually arise in the case, the court expressed a strong opinion that it is the outside wrapper that should be marked.² In this case the word "wrapper" was given a very wide meaning under this statute. There a pound of margarine was sold in a cardboard box, to which a folded paper (containing an advertisement of margarine) was attached by a paper band. The word "margarine" in letters of the required size was printed partly on the box, partly on the paper, and partly on the band. The court considered that the box, paper and band together constituted a wrapper within the meaning of the statute, and that the box was not a "package" within the meaning of that word as used, to the effect that "every package, whether open or closed, and containing margarine."³

§ 550. Notice on Label Must Be Clear and Truthful.

An English statute provides that "No person shall sell to the prejudice of the purchaser any article of food or any drug which is not of the nature, substance and quality of the article demanded by such purchaser."¹ Certain exceptions follow this quotation not here necessary to quote. This statute requires, in order to incur its penalty, that the sale shall

¹ *World's Tea Co. v. Gardner*, 59 J. P. 358.

² *Toler v. Bishop*, 60 J. P. 9,

65 L. J. M. C. 4, 75 L. T. 403, 18 Cox C. C. 202.

³ *Toler v. Bishop*, *supra*.

¹ 38 and 39 Vict., ch. 63, § 6.

be "to the prejudice of the purchaser," and the decisions are to the effect that if the purchaser has notice just what is the composition of the article of food or the drug at the time he purchases it, there is no sale to his prejudice.² In such an instance he buys with his eyes open, with knowledge of what he is buying, and, therefore, there is no sale to his prejudice. Of course, the notice must be clear and unequivocal. Some cases illustrate this statement. Thus a purchaser, on entering a shop and asking for some cheese, was supplied with a mixture which was compounded of skimmed milk and beef fat, the bulk of the butter fat which is contained in cheese made from "whole" milk having been abstracted. Attached to the bulk of the substance from which the purchaser's portion was taken was a label containing the words "Vallefield Finest Oleine Cheese," the words "Finest Oleine" being in smaller type than the others. No notice of the admixture by a label on or with the article was given to the purchaser, so as to give the seller a defense given by statute where, at the time of delivering the article of food, he supplied to the person receiving it a notice, by label distinctly or legibly written or printed on or with the article, to the effect that it was mixed. The purchaser did not notice the word "Oleine" on the label, and said that if he had he would not have known what it meant. It was held that the vendor had sold the article of food to the prejudice of the purchaser, and had therefore violated the statute.³ In another instance an in-

² The decisions on this subject have been reviewed on this point in Section 552 and are as follows: *Sandys v. Small*, 3 Q. B. Div. 449, 42 J. P. 550, 47 L. J. M. C. 115, 39 L. T. 118, 26 W. R. 814; *Higgins v. Hall*, 51 J. P. 293; *Gage v. Elsey*, 10 Q. B. Div. 518, 47 J. P. 391, 52 L. J. M. C. 44, 48 L. T. 226, 31 W. R. 501; *Dawes v. Wilkinson* [1907], 1 K. B. 278, 71 J. P. 23, 76 L. J. K. B. 182, 96 L. T. 26, 23 T. L. R. 34, 21 Cox C. C. 340, 5 L. G.

R. 1; *Morris v. Johnson*, 54 J. P. 612; *Morris v. Askew*, 57 J. P. 724; *Pearks, Gunston & Tee v. Ward* [1902], 2 K. B. 1, 66 J. P. 774, 71 L. J. K. B. 656, 87 L. T. 51; *Pearks, Gunston & Tee v. Houghton* [1902], 1 K. B. 889, 66 J. P. 422, 71 L. J. K. B. 385; 86 L. T. 325, 50 W. R. 605; *Hayes v. Rule*, 87 L. T. 133, 18 T. L. R. 535.

³ *Collett v. Walker*, 59 J. P. 600, 64 L. J. M. C. 267.

spector asked for coffee and was given a mixture containing 74 percent of chicory in a wrapper labeled "Coffee Mixture," with the words "Sold as a mixture of coffee and chicory" in very small print. It was held that the words "Coffee Mixture" would not necessarily lead a purchaser to suspect adulteration, and therefore the vendor was rightfully convicted.⁴ So where a purchaser asked for "sweet milk," and was given a mixture of sweet milk and skim milk with 2.63 percent of fat, contained in a can embossed with the words "not guaranteed 3 percent," the court held that he had not got what he asked for, and that the vendor was not protected by the words on the can.⁵ Likewise, where the purchaser asked for a bottle of brandy and was given one labeled "Old Brandy, Trioche & Co., Cognac," and containing 65 percent of spirits other than brandy, it was held that the statute had been violated.⁶ It is not permissible to sell an imitation under the distinctive name of another food, nor to label or brand an article of food so as to falsely indicate that it contains certain ingredients in certain proportions.⁷

§ 551. Mixture—Sufficiency of Label on Can of Condensed Milk.

A customer purchased at a milk dealer's shop a tin of condensed milk for 4½ pence. At the time of the purchase the attention of the purchaser was not called to any label on the can or tin, but he saw on it a label with "Condensed Milk, Swiss Dairy Brand," in large letters, and in smaller type on the back of the tin, "Swiss Dairy Brand. This tin contains skimmed milk prepared with the finest sugar. It will be found cheaper than ordinary fresh milk and useful for all household purposes. The Condensed Milk Company of Ireland (Limited), Limerick." It was shown that 93 percent of the butter fat had been abstracted from the milk, and that

⁴ *Star Tea Co. v. Neale*, 73 J. P. 175, 6 Fraser (J. C.), 10, 4 Adam 311, 8 L. G. R. 5. 310, 41 Sc. L. R. 195.

⁵ *Souter v. Lean*, 6 Fraser 7 *People v. Luke*, 122 N. Y. App. (J. C.) 20, 4 Adam 280. Div. 64, 106 N. Y. Supp. 621.

⁶ *Wilson v. McPhee*, 68 J. P.

the material was injuriously affected thereby. It was held that the label was a sufficient disclosure that the milk had been skimmed before the sale, and that it was not necessary to especially call the purchaser's attention thereto.¹ In another case one P. was charged with selling condensed milk from which 80 percent of fat had been abstracted without disclosing the alteration. The purchaser went into the shop and asked for a can of condensed milk. He was told that there were several sorts of condensed milk at different prices, and that some of them were skimmed milk. He decided to take a can at 3½ pence. The can was handed to him and he duly declared that he had bought it for analysis, and divided the milk into three parts, as the statute in case of an analysis required. The owner of the shop then came forward and told him the article supplied was condensed skimmed milk, and drew his attention to the label on the back of the can, which contained (among others) the following words: "Calf Brand. This tin contains skimmed milk, with nothing added but the finest sugar." The label on the front of the can described the article as "Condensed Milk (calf brand)." The justices of the peace trying the case found as a fact that the label was not, either by its position of conspicuousness, and especially having regard to the fact that the article was described in the main part of the label as "condensed milk," and not as "condensed skimmed milk," a label distinctly printed with the article. It was held that the justices were wrong in convicting the defendant vendor, and that the statute requiring articles sold to be labeled so as to show the contents of the article had been sufficiently complied with.² On a demand for purchase of condensed milk, a label affixed round a tin or can of condensed milk, having printed thereon (inter alia) in red letters the words, "This tin contains skimmed milk," whereas the tin, in fact, contained separated milk, from which 97 percent of the original fat had been abstracted, while it was proved as a fact that no more than 63 percent of the original fat could be abstracted by the process

¹ Jones v. Davies, 57 J. P. 808, ² Platt v. Tyler, 58 J. P. 71.
69 L. T. 497, 9 T. L. R. 492.

of skimming, it was held that the label did not give proper and sufficient notice of the alteration in the milk.³

§ 552. Seller Calling Attention to Notice on Label—Otherwise Notified.

The question here arises whether it is the duty of the vendor to call the attention of the purchaser to the notice on the label. In one instance the tin can of cocoa in question, with the label upon it, was wrapped in a sheet of opaque white paper before delivery to the purchaser, who had no opportunity of seeing the label, nor was his attention called to it. The cocoa was sold at 8 pence per pound, the price of the best pure cocoa being 2 shillings 8 pence per pound. It was held that a sufficient notice had been given, one of the judges saying: "There was a label which distinctly stated that the article was mixed. It has been seriously contended that it was no label, because it was wrapped up in opaque paper at the time of being sold. The paper covering was merely the usual way of giving the article to a purchaser. The article has been so mixed for thirty years, and must have been well known to purchasers. To say that there was no label because of its being wrapped up is an absurdity."¹ This decision was rendered upon a statute which provided that no one should be guilty of any offense in respect to the sale of any article of food "mixed with any matter or ingredient not injurious to health, and not intended fraudulently to increase its bulk, weight or measure, or conceal its inferior quality if at the time of delivering such article he shall supply to the person receiving the same a notice, by a label distinctly and legibly written or printed on or with the article, to the effect that the same is mixed."² But in a subsequent case this case was distinguished. In that case the owner of it sold butter blended with milk in such a way as to cause the butter to contain an excess of water to the extent of 7.8 percent. They sold it in a wrapper on which was a label in the following

³ *Petchey v. Taylor*, 62 J. P. 360,
78 L. T. 501, 19 Cox C. C. 38.

¹ *Jones v. Jones*, 58 J. P. 653.

² 38 and 39 Vict., ch. 63, § 8.

terms: "Pears' Butter. This is choicest butter, blended with pure English full cream milk, by new and improved machinery, whereby it retains about 20 to 24 percent of moisture and acquires that delicacy of flavour which has made Pears' butter so famous. This package weighs half a pound including wrapper." The printed wrapper was in turn enclosed in a second wrapper which effectually concealed the printed matter. It was held that the owner so selling the article was not entitled to rely upon the provisions of the statute quoted above, owing to the presence of the opaque wrapper. "In my opinion," said one of the judges, "the delivery of the article with a notice printed on an inner label, covered with an opaque wrapper, would not be sufficient. *Jones v. Jones* is not a sufficient authority on the facts of the present case. There the article sold was a tin of cocoa, and it was assumed to be a matter of common knowledge that tins had labels on them, and therefore the fact that they were wrapped up when delivered to the purchaser could not prevent the label having the effect of a notice to the purchaser. The question of the sufficiency of the notice is one to be decided on the particular facts of each case; but I doubt whether a purchaser of a pound of butter, on being handed such a packet, could be taken to have notice that there was another label inside the outside wrapper. If, therefore, the inner label was the only defense relied upon by the appellants (the owners), I should not be prepared to say that their contention was right."³ But the delivery of the label in accordance with the section quoted is not the only means available for giving the purchaser notice of what he is purchasing. Speaking of this statute Chief Justice Cockburn said in one case that it provided "a mode by which the seller may insure himself against the possibility of the enactment operating to his prejudice. If he delivers the label as provided by that section (statute), he protects himself against the possibility of being charged with an offense under the Act. If he does not, then I think it is incumbent on him to prove that, by several other means,

³ *Pearks, Gunston & Tee v. P.* 422, 71 L. J. K. B. 385, 86 L. Houghton [1902], 1 K. B. 889, 66 J. T. 325, 50 W. R. 605.

the purchaser had notice of what he was purchasing. . . . I do not think the statute means that the affixing of the label is to be the only mode of bringing knowledge home to the purchaser. I think if a man puts up in a conspicuous position a notice, in large letters, as was done here, and it is clear that it must have come under the observation of the customer, that the statute [creating an offense for selling an article to the prejudice of the purchaser] would not apply."⁴ In another case the vendor called the purchaser's attention to a printed notice which was hanging up in the room: "All spirits sold in this establishment are of the same quality as heretofore, but to meet the requirement of the Food and Drugs Adulteration Act⁵ they are now sold as diluted spirits; no alcoholic strength guaranteed." It was held that there was no sale to the prejudice of the purchaser.⁶ In another case the facts were exactly the same, but the notice was: "All spirits sold in this establishment are of the same quality and strength as heretofore, but, in order to comply with the Food and Drugs Act, will not be of any guaranteed strength." This notice was held not to be sufficient because it did not bring to the purchaser notice of the fact that the spirits were diluted. In other respects it seems to have been sufficient.⁷ In another instance two servants of an inspector went into a public house and entered a public room called the club room, passing by the bar and kitchen on their way. They then called for half a pint of whisky, and were served with it in the club room. Upon analysis the whisky proved to be 37½ degrees under proof, and the usual statutory proceedings were instituted against the vendor. There was evidence that at the time of the sale there was a notice posted in the bar and the kitchen to this effect: "All spirits sold at this estab-

⁴ *Sandys v. Small*, 3 Q. B. Div. 449, 42 J. P. 550, 47 L. J. M. C. 115, 39 L. T. 118, 26 W. R. 814.

⁵ The statute under which the vendor was prosecuted.

⁶ *Gage v. Elsey*, 10 Q. B. Div. 518, 47 J. P. 391, 52 L. J. M. C. 44, 48 L. T. 226, 31 W. R. 501.

Exactly a similar notice was involved in *Palmer v. Tyler*, 61 J. P. 389, with a like result.

⁷ *Dawes v. Wilkinson* [1907], 1 K. B. 278, 71 J. P. 23, 76 L. J. K. B. 182, 96 L. T. 26, 23 T. L. R. 34, 21 Cox C. C. 340, 5 L. G. R. 1.

ishment are diluted with water according to price," but there was no such notice in the club room. It was further proven that the bar and kitchen were visible to any one approaching the club room from the entrance, and there was but one entrance to the house; that neither of the two men saw or knew of any notice posted in any part of the house, and that nothing was said at the time of the sale concerning the quality of the whisky. There was nothing to show that the two men did not in fact know that the spirits sold at this house were diluted. The justices before whom the vendor was prosecuted refused to convict the vendor, but stated a case for the High Court, which held that these justices, before they came to their decision, ought to have inquired whether the purchasers knew that the practice at the vendor's house was to sell only diluted spirits, in which case no conviction was proper. "The purchaser's complaint," said one of the judges, "is that they did not see the notice; but then there was no finding in the case whether they did not know well enough of the diluting of all spirits before sold at the respondent's (vendor's) house. If the justices find that the men did not know that spirits were diluted, then there should have been a conviction. But if they did know, then there should be no conviction."⁸ Perhaps, however, these cases are not at one with other cases upon the same statute. There it was said that the case might be "to the prejudice of the purchaser," although the purchaser had special knowledge, not derived from information given by the seller, that the article sold was not of the nature, substance and quality demanded by him, and that the test is, whether the sale would have been to the prejudice of a purchaser who had not that special knowledge. "The question, in my opinion," said Lord Alverstone, "is not what is the actual knowledge of the particular purchaser, except insofar as that knowledge is derived from information given by the seller either by notice, by the nature of the article itself, or by what passed at the time of the purchase; the question is, What would be the position, not of a skilled pur-

⁸ *Morris v. Johnson*, 54 J. P. 612. See also apparently a similar case, *Morris v. Ashew*, 57 J. P. 724.

chaser like an inspector, but of an ordinary person purchasing the article without special knowledge?" Judge Darling added: "There is a sale to the prejudice of the purchaser if a purchaser in the abstract would be prejudiced, although the actual purchaser may, for some reason peculiar to himself, not be prejudiced."⁹ In another case there was a notice in a conspicuous position in the shop, to the following effect: "Notice. Pearks' butter, sold at this establishment, is choicest butter blended with English cream and milk by new and improved machinery, whereby it retains about 20 to 24 percent of moisture and acquires that delicacy of flavour which has made Pearks' butter so famous." An inspector asked for half a pound of shilling butter, and did not, in fact, see the notice. The butter supplied him was blended with milk in such a way as to contain 7.8 percent of water above the permissible maximum of 16 percent. The court held that, assuming that only one kind of butter was sold in the shop, the seller was protected by the notice, and the sale was not to the prejudice of the purchaser.¹⁰ Where an inspector asked for "best fresh butter," and did not actually see the notice placed up in the shop, though he admitted he could have done so if he had liked, the court expressed the opinion that, under the circumstances, the sale would be to the prejudice of the purchaser, unless it could be proved that he actually saw the notice.¹¹ A., a publican, was charged with selling rum which was not of the nature of the article, being adulterated with 19 percent of added water. On the purchaser asking for rum A. said he had two qualities, one at 1 shilling and another at 1 shilling 2 pence per half pint, and the quality at 1 shilling was supplied. The analysis showed that the rum was 38 degrees under proof, and contained 19 percent of water beyond the statutory limit. There was this notice stuck up in the house: "All spirits sold here are diluted in accord-

⁹ Pearks, Gunston & Tee v. Ward J. P. 422, 71 L. J. K. B. 389, 86 [1902], 2 K. B. 1, 66 J. P. 774, L. T. 325, 50 W. R. 605.

71 L. J. K. B. 656, 87 L. T. 51.

¹¹ Hayes v. Rule, 87 L. T. 133,

¹⁰ Pearks, Gunston & Tee v. Houghton [1902], 1 K. B. 889, 66

18 T. L. R. 535.

ance with the new excise regulations." It was held that this mere notice was no protection to A., but the question was whether the purchaser had been prejudiced.¹²

§ 553. Sale of Food in Altered State—Disclosure of Alteration—Knowledge of Alteration.

An English statute provides that: "No person shall, with the intent that the same may be sold in its altered state without notice, abstract from an article of food any part of it so as to affect injuriously its quality, substance or nature, and no person shall sell any article so altered without making disclosure of its alteration."¹¹ Under this section, if at the time of the sale the vendor gives notice to the purchaser that the food has been altered or part of its strength abstracted, he does not violate this section. But if no such notice has been given it is no defense to a prosecution under it for him to plead he had no knowledge of the alteration at the time of the sale. Thus, where a milk seller sold milk from which 28 percent of the original fat had been abstracted, without making disclosure of the alteration, and no evidence was given that the person selling it had knowledge of the alteration, and the seller gave no evidence he had no such knowledge, and his daughter, who sold the milk, denied all knowledge of the alteration, it was held that he had violated the provisions of this section.² In another instance a milk dealer poured into the pail eight gallons of unskimmed milk, which she sold therefrom to her customers in small quantities, dipping it out of the pail from time to time with a measure. The sale of the contents of the pail extended over a space of between four and five hours, during the whole of which time, owing to the neglect of the seller to keep the milk stirred, the cream was continually rising to the surface. When not more than two quarts of the milk remained a buyer purchased of her a pint of milk from the pail, which, upon analysis, showed a

¹² *Morris v. Askew*, 57 J. P. 724; *Div. 353*, 54 J. P. 469, 59 L. J. *Palmer v. Tyler*, 61 J. P. 389. M. C. 45, 62 L. T. 284, 38 W. R.

¹ 38 and 39 Viet., ch. 63, § 9. 428, 16 Cox C. C. 747, 6 T. L. R.

² *Pain v. Boughtwood*, 24 Q. B. 167.

deficiency of 33 percent of fatty matter. She did not disclose to the purchaser this deficiency, which was entirely due to the manner in which the early customers had been served. The court held that the words "so altered" in the statute quoted referred to a physical alteration of the article, irrespective of the intent with which the alteration was made, and that she, in selling the milk so altered without giving notice of its condition, had been guilty of an offense under this statute. "It is not necessary in the interests of the public," said Lord Coleridge, "to prohibit the mere alteration of an article of food, unless the alteration is coupled with the intent of selling it in its altered state without notice, for the mere alteration without such intention may be perfectly innocent. Where, however, the alteration is followed by the actual sale, the intent with which the article was altered must become perfectly immaterial, the injury to the purchaser being just the same whether there was a wrongful intent or not."³ In still another case the facts were as follows: The servant of a dairyman, being short in his supply of milk, bought two gallons from another dairyman and mixed it with his own. The milk so bought he sold to various customers. An inspector bought half a pint of it, and it was found to be deficient in cream to the extent of 20 percent. The dairyman was accordingly prosecuted under this statute. It was held that, though neither the dairyman nor his servant knew, or had reason to know, that cream had been abstracted from the milk, this was no defense.⁴ A few cases have been decided construing the word "disclosure" as used in this statute. Thus, one Davies sold a can of condensed milk which had upon it a label on which was printed the words, "Condensed Milk, Swiss Dairy Brand," and in smaller type, "This can contains skimmed milk." The analysis of the contents of the can showed a deficiency of 93 percent of butter fat, but, though the purchaser's attention had not been called to the words on the label at the time of the sale, the

³ *Dyke v. Gower* [1892], 1 Q. C. 70, 65 L. T. 760, 17 Cox C. C. B. 220, 56 J. P. 168, 61 L. J. M. 421, 8 T. L. R. 117.

⁴ *Morris v. Corbett*, 56 J. P. 649.

court held that this was a sufficient "disclosure of the alteration" under this statute.⁵ Well-known refreshment contractors were prosecuted for selling milk from which 17 percent of cream had been extracted. The deficiency was caused by the milk being poured out in such a way that the greater part of the cream remained in the vessel from which it was poured. The milk was supplied in a glass whereon was distinctly written in blue color the words, "Not guaranteed as new or pure milk, or with all its cream; see notices." On the counter, a few feet from the place where the purchaser was standing when he was served with the milk, and facing the entrance to the refreshment rooms from the street, was placed a framed notice in these words: "Milk Notice. Spiers and Pond, Limited, purchase all milk sold by them under a warranty of its purity and genuine quality, and take all possible precautions to insure its supply to their customers in proper condition, but they are unable to guarantee it as either new, pure, or with all its cream, and (to meet the requirement of the Sale of Food and Drugs Act) do not, therefore, sell it as such." It was held that the alteration had been sufficiently disclosed, and that the vendor of the glass of milk was not liable.⁶ A can of condensed milk was sold as "condensed skimmed milk;" 97 percent of the original fat had been abstracted by the use of a separator. It was shown that not more than 63 percent can be abstracted by skimming. The magistrate held that the words "skimmed milk" did not properly describe the alteration. The High Court held that it was a question of fact whether the description was sufficient, and that the magistrate's decisions could not be interfered with.⁷ A statute making it an offense to sell an article of food if any valuable or necessary constituent or ingredient has been wholly or in part abstracted from it, is not violated by a sale of a package containing a manufactured

⁵ Jones v. Davies, 57 J. P. 808, 65 L. J. M. C. 144, 74 L. T. 697, 69 L. T. 497; Platt v. Tyler, 58 44 W. R. 510, 18 Cox C. C. 332. J. P. 71.

⁷ Petchey v. Taylor, 62 J. P. 360.

⁶ Spiers & Pond v. Bennett 78 L. T. 501, 19 Cox C. C. 38. [1896], 2 Q. B. 65, 60 J. P. 437,

product of the cocoa bean, and labeled "Breakfast Cocoa," from which a portion of the natural oil has been abstracted, where the abstraction of the oil is necessary to render the article marketable.⁸

§ 554. False Representations Made Before Sale at Variance with Label.

A false representation concerning the nature, substance and quality of the article demanded, made by the seller prior to the sale, does not constitute a violation of a statute providing that the true nature of the article of food or drug shall be disclosed at the time of the sale. Thus, a milkman stated to an officer that some cans contained new milk, but afterwards, on the officer intimating that he would have some, declared that it was old milk, and not new. The magistrates decided that this was not a sale of new, but of old milk, and that there had been no misrepresentations made at the time the sale was actually consummated.¹ A similar case arose in Scotland. There a milk seller on his rounds ran short of milk, and bought a further supply from a dairyman. An inspector asked him for some "sweet milk." He was going to supply him from what was left of his own milk, but the inspector insisted upon being supplied from the can containing the purchased milk. He told the inspector before the purchase that it was not his own milk, and warned him that it might or might not prove to be sweet milk. The milk turned out to be adulterated. The seller was acquitted.² If a false representation is made at the time of the purchase an offense is committed, even though the purchaser must have known from the price paid that the representation was false. Thus.

⁸ *Rose v. State*, 11 Ohio Cir. Ct. Rep. 87, 1 Ohio C. D. 72, reversing 2 Ohio N. P. 270.

Patented articles of food must be labeled if other foods must be. *Palmer v. State*, 39 Ohio St. 236, 48 Am. Rep. 529.

¹ *Kirk v. Coates*, 16 Q. B. Div.

49, 50 J. P. 148, 55 L. J. M. C. 182, 54 L. T. 178, 34 W. R. 295.

² *Frew v. Gunning*, 3 Fraser (J. C.) 51, 3 Adam 339, 38 Sc. L. R. 555. See *Sandys v. Jackson*, 69 J. P. 171, 92 L. T. 646, 3 L. G. R. 285.

a milkman sold a pint of milk for a penny as new milk, though it in fact was skimmed milk. Although the purchaser knew it was skimmed milk, yet it was held that the vendor had violated the statute.³ In another instance an inspector asked for "paregoric," and was given a bottle labeled "Paregoric Substitute," but wrapped in an opaque wrapper. The substitute contained no opium, an essential ingredient according to the British Pharmacopoeia. The assistant who served him, being unqualified, was not permitted by law to sell opium, and the next day the employer wrote and apologized for the "technical error" of not informing the inspector at the time. The justices trying the seller found that there was no prejudice to the purchaser, and the High Court held that there was evidence to support their findings.⁴

§ 555. Fraudulent or False Label.

An English statute provided that no one shall be guilty of a violation of its provisions "in respect to the sale of articles of food or a drug mixed with any matter or ingredient not injurious to health, and not intended fraudulently to increase its bulk, weight or measure, or conceal its inferior quality, if at the time of delivering such article or drug he shall supply the person receiving the same a notice, by a label distinctly or legibly written or printed on or with the article or drug, to the effect that the same is mixed."¹ When the mixture is sold in a labeled package, this statute requires justices to determine whether the admixture has been made for any of the fraudulent purposes above mentioned. This is purely a question of fact. In one case where the inspector asked for coffee he received a packet with a label describing it as a mixture of coffee and chicory. The analyst's certificate showed that it was composed of 60 percent of chicory and 40 percent of coffee. The magistrates decided that the seller was not protected by the label, as the 60 percent of chicory was used for

³ Heywood v. Whitehead, 76 L. T. 781.

⁴ Bundy v. Lewis, 72 J. P. 489, 99 L. T. 833, 7 G. R. 55. This

case is regarded, however, valueless as an authority.

¹ 38 and 39 Vict., ch. 63, § 8.

the purpose of fraudulently increasing the bulk or weight of the coffee, and convicted the defendant. The conviction was upheld by the High Court.² In another instance, under similar circumstances, a mixture was sold which contained 85 percent of chicory instead of 60. The defendant, besides pleading the label in defense, urged that he sold the article in the condition in which he received it from the manufacturer. The magistrate found that the chicory had been added fraudulently. The High Court upheld this decision, and one of the judges said that the magistrate was bound to find whether the chicory was used fraudulently to increase the bulk; that if it was so used he ought to convict, notwithstanding the label, and that it was no defense for the vendor to say that he sold it just as he had received it from the manufacturers.³ In another instance the facts were somewhat different. An inspector, on entering a shop, asked for "French Coffee," and was supplied with a mixture containing 60 percent of chicory and 40 percent of coffee. Upon the tin was a label stating that it was a mixture, and his attention was called to the label. There was also evidence that "French Coffee" was a well-known commodity, and that the description was not misleading; but the magistrates convicted the seller on the ground that the chicory had been added fraudulently to increase the bulk. But the High Court held that there was no evidence of fraud; that the seller was protected by the label, and that the conviction was wrong.⁴ In another instance the mixture sold consisted of 30 percent of cocoa and 70 percent of starch and sugar, and it was held that a label stating it to be a mixture, in the absence of any evidence of fraud (since nearly all cocoas are mixtures), was a sufficient protection to the seller.⁵ In still another instance the purchaser asked for "best fresh butter," and was supplied with "Pearks' butter," a mixture of butter and milk containing over 20 percent of water. The butter was handed

² Liddiard v. Reece, 44 J. P. 233.

A similar case is *Star Tea Co. v. Neale*, 73 J. P. 511, 8 L. G. R. 5.

³ *Horder v. Meddings*, 44 J. P. 234.

⁴ *Otter v. Edgley*, 57 J. P. 457.

⁵ *Jones v. Jones*, 58 J. P. 653.

to him in a wrapper on which was a printed label containing the following words: "Pearks' butter. This is choicest butter, blended with pure English full cream milk, by new and improved machinery, whereby it retains about 20 to 24 percent of moisture, and acquires that delicacy of flavour which has made Pearks' butter so famous. This package weighs half a pound, including wrapper." The court considered that, although the butter was not "best fresh butter," yet the vendors were protected by the label.⁶ A sale of wheat middlings and corn for domestic animals under a label representing them to be such, when in fact it is adulterated with corn-cob meal, is a violation of a statute prohibiting the misbranding or adulteration of any article of food.⁷ An article composed of the compound of vanilline, cumerin, spirits, sugar, coloring and water, and plainly labeled on one side with the words "Peerless Extract of Vanilla," and on the reverse side, in small letters, with the words "Formula Vanilline, Cumerin, Spirits, Sugar, Coloring, Water," is misbranded within the provisions of a statute declaring that an article shall be deemed misbranded where it is an imitation of, or offered for sale under the distinctive name of another article, and is not a mixture or compound known under its own distinctive name.⁸ Such a statute prohibits the sale of a counterfeit for the genuine, though the counterfeit does not contain poisonous or deleterious ingredients; and where a false label is put on one side of an article in such a manner as to arrest the eye, the offense is not evaded by a true label put where it is likely to escape notice.⁹ A statute which makes it an offense to sell an unlabeled, adulterated food, has no application to a sale of an unlabeled but not adulterated article.¹⁰ A statute forbade the sale of cane syrup or

⁶ *Hayes v. Rule and Law*, 87 L. T. 133, 18 T. L. R. 535.

⁷ *W. H. Small & Co. v. Commonwealth*, 134 Ky. 272, 120 S. W. 361.

⁸ *People v. James Battler*, 134 N. Y. App. 986, 118 N. Y. Supp. 849.

⁹ *People v. James*, *supra*.

¹⁰ *State v. Weeden*, 17 Wyo. 418, 100 Pac. 114.

A statute making it an offense to sell misbranded food, being penal, must be strictly construed, and if it merely requires packages of food to be branded, it is not an

beet syrup mixed with glucose, unless the package containing it be distinctly branded "Glucose Mixture" or "Corn Syrup," with the name and percentage of each ingredient contained therein plainly stamped thereon. Under this statute it was held that a sale of syrup made of 90 percent pure corn syrup and 10 percent cane syrup, labeled "Victor Corn Syrup," and truthfully stating the ingredients composing it, was not in violation of its requirements, in that it was not branded "Glucose 90 percent and Cane Syrup 10 percent."¹¹ A New York statute provides that where honey is one of the ingredients of a mixture it shall be so stated in the same size type as the other ingredients, but shall not be sold as honey, nor shall it be branded as "honey" in any other form than as provided by law, nor shall any mixture be sold as honey or branded with the word "honey" unless it is pure. A subsequent statute provided that an article of food which does not contain any deleterious ingredients shall not be deemed adulterated if it is so labeled as to plainly indicate that it is a mixture or combination, and that it should be so labeled as to show the character and its constituents. The defendant sold a mixture composed in part of honey. On the label of the package appeared the words "honey syrup," "honey" in letters many times larger than those in the latter word. In an action to recover the penalty imposed by the statute for a violation of its provisions, the evidence showed that only one other substance than honey was employed. The plaintiff insisted that the word "glucose" should have been employed, but there was no evidence that

offense to sell unlabeled food when it is not put up in such packages. *State v. Neslund*, 141 Iowa 461, 120 N. W. 107.

By a statute commercial products had to be "branded or tagged with the manufacturer's analysis" showing the percentages of certain determinations specified in such statute. It was held that, if any analysis branded on the package

showed the percentages of ingredients the fertilizer is guaranteed to contain, it need not specify other ingredients mentioned in the statute, about which there is no guaranty. *Williams v. Barfield*, 31 Fed. 398.

¹¹ *People v. Harris*, 135 Mich. 136, 97 N. W. 402, 10 Detroit Leg. N. 694.

such substance was an article of food under the distinctive name of "glucose." It was held that the court should have taken judicial notice that the word "glucose" enters into the many different articles of food, and was not used by itself as such, so that it was a question of fact whether the word "syrup" was not a sufficient characterization of the ingredients employed, so as to take the case to the jury.¹²

§ 556. Instances of Proper and Deficient Labels.

A statute required an original package to be marked on its top, side and bottom. The top of a package was removed so as to expose the oleomargarine, and while in that condition a sale was made at retail of a small quantity. It was held that the statute had not been violated; for the statute did not say that under such circumstances the package should be constantly kept covered.¹ If the vessel from which the sale is made be properly marked, it is error to tell the jury the seller is liable to the penalty of the statute unless the buyer had notice or knowledge that the article was adulterated.² Where a statute made it unlawful to sell oleomargarine from a wagon without having on both sides of the vehicle placards marked "Licensed to Sell Oleomargarine," the hanging of such placards on both of the insides of the wagon was held not to be a compliance with its provisions.³ A statute requiring a restaurant keeper to notify his customer that the article furnished is not butter is not complied with by placing on the walls conspicuous signs on which are the words, "Butterine Used Only Here," and to put on the bill of fare, "Only Fine Butter Used

¹² *People v. Berghoff*, 47 N. Y. Misc. Rep. 1, 95 N. Y. Supp. 257; affirmed 112 N. Y. App. Div. 772, 99 N. Y. Supp. 201.

A picture of a churn on boxes containing oleomargarine is a representation that it contains butter, and the article on which it is placed is falsely branded within the meaning of a statute making it

an offense to falsely brand an article of food. *People v. Griffin*, 128 N. Y. Supp. 946.

¹ *Commonwealth v. Bean*, 148 Mass. 172, 19 N. E. 163.

² *Commonwealth v. Smith*, 149 Mass. 9, 20 N. E. 161.

³ *Commonwealth v. Crane*, 158 Mass. 218 33 N. E. 388.

Here," unless such guest saw the signs or read the bill of fare.⁴ A statute prohibiting the sale from a public vehicle in the street of "oleomargarine, butterine or any substance made in imitation or semblance of pure butter" without a sign therein provided for, applies to all kinds of oleomargarine, whether designedly made to imitate butter or not.⁵ If the statute requires the seller of oleomargarine to orally inform the purchaser what it is and to give him "a card or notice, printed on which shall be the name of the substance sold, and the name and address of the seller or vendor," a failure to give such card, although full information was given orally, is such a violation of the statute as lays the seller liable.⁶ Where a statute forbids the sale of oleomargarine in imitation of yellow butter, a sale of such oleomargarine thus an imitation, although the purchaser be fully informed of the character of the article at the time he purchases it, is a violation of the statute.⁷ The label on a bottle of "lime juice" referred to "this famous beverage" as being "mixed and composed only of the juice of the lime and other natural fruits, acids, etc., diluted with water," and then went on to state that it was a most refreshing and wholesome beverage. The "lime juice" consisted of water containing but little lime juice. It was held that the label was only an advertisement and not a statement of the "nature or composition" of the lime juice within the meaning of the Australian statute.⁸

⁴ Commonwealth v. Stewart, 159 Mass. 113, 34 N. E. 84.

⁵ Commonwealth v. Crane, 162 Mass. 506, 39 N. E. 187.

⁶ Bayles v. Newton, 50 N. J. L. 549, 18 Atl. 77.

⁷ Commonwealth v. Russell, 162 Mass. 520, 39 N. E. 110.

If diseased meat can be lawfully sold to a purchaser by disclosing fully its condition, upon proof of a sale of such a meat the burden is upon the defendant to show he

gave the notice required to make the sale lawful. Seibright v. State, 2 W. Va. 591. See State v. Falk, 38 Mo. App. 554, as to indictment.

Under New York Laws 1881, ch. 407, relating to the selling of adulterated food, the presence or absence of a label does not constitute an element of the offense. People v. Bischoff, 14 N. Y. St. Rep. 581.

⁸ Rider v. Freebody, 24 Vict. L. R. 429, 20 Aust. L. T. 115, 4 Aust. L. R. 251.

§ 557. Brands.

When the statute requires brands to be placed upon boxes containing food, it does not necessarily mean that the letters shall be burned into the box; it is enough that the letters be placed upon the package in a legible and distinct manner, as by a stencil plate and chisel.¹

¹Dibble v. Hathaway, 11 Hun 571.

CHAPTER XIV.

SALE AND EXPOSING FOR SALE.

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| SEC. | SEC. |
| 558. What constitutes a sale. | 567. Special contract as to quality of goods. |
| 559. Knowledge of adulteration of milk. | 568. Purchaser having knowledge food is adulterated. |
| 560. Ignorance of adulteration of food. | 569. Offered for sale. |
| 561. Ignorance of adulteration of food, continued. | 570. Manufacture or possession with intent to sell. |
| 562. Lack of knowledge of adulteration lessening penalty. | 571. Resale of food purchased under written warranty of its purity. |
| 563. Article sold to the prejudice of the purchaser — Actual damages. | 572. Sales by agent. |
| 564. The article demanded—Sale to prejudice of purchaser. | 573. Liability of agent. |
| 565. Exposure for sale. | 574. When agent and not principal liable. |
| 566. Purpose of sale. | 575. Knowledge measure is too small. |

§ 558. What Constitutes a Sale.

There is nothing peculiar about a sale of unwholesome food. Such a sale does not differ from a sale of any other article, so far as is necessary to make a complete sale. In one instance it has been held that the unwholesome food sold must be paid for before there can be a conviction;¹ but such is not the true rule, for a sale on credit is as much a sale as one for cash. Perhaps illustrations of what has been held to constitute a sale of food will be more satisfactory than any discussion of the general principles of sales. Thus a milk dealer, whose father owned a milk route, carried the milk to the customers; the defendant and another employee knowingly adulterated the milk with water while on their way to distribute it to such customers; and the defendant

¹ Heider v. State, 4 Ohio Dec. 227.

handed one of the cans of adulterated milk from the wagon to his co-employee, who delivered it to the purchaser. This was held to be such a sale by the defendant as rendered him liable.² The delivery of milk to the purchaser of a table d'hôte breakfast, as a part of the meal, is as much a "sale" of the milk as if a special price had been put on it, or it had been bought and paid for by itself.³ Where one G was not shown to have ordered, advised, approved, or had knowledge of a sale of oleomargarine by another not under his, G's, control without being properly printed or branded, it was held that G could not be convicted of the alleged wrongful sale of the oleomargarine.⁴ The defendant, it was shown in one case, took local orders for a butter substitute from individuals, and sent them to some manufacturer outside the State; the orders were then filled and marked for the several individuals, but were consigned together in care of the defendant, who thereby secured a minimum freight rate; the orders were filled at the local market price, but by an agreement with the defendant the manufacturer made out an account for each order to the person giving it, charging therein the amount of the price to the defendant, freight at the rate of single orders, and a charge for delivery by the defendant, who received and forwarded the money. It was held that the sales were made by the defendant.⁵ A grocer sent his soliciting agents into another county, where he had no license, and took orders there for oleomargarine, which orders were accepted at his store, and the oleomargarine shipped to the customer not in his name, but in care of the agent, and it was taken by the agent from the railroad agent and delivered to the customers. It was held that the grocer could not be convicted in the county where the or-

² Commonwealth v. Haynes, 107 Mass. 194; People v. Teele, 131 N. Y. App. 87, 115 N. Y. Supp. 212.

³ Commonwealth v. Warren, 160 Mass. 533, 36 N. E. 308; Commonwealth v. Vieth, 155 Mass. 442, 29 N. E. 577; Commonwealth v. Miller,

131/Pa. 118, 18 Atl. 938, 25 Wkly. N. C. 137; People v. Fox, 4 N. Y. App. Div. 38, 38 N. Y. Supp. 635.

⁴ Goll v. United States, 166 Fed. 419, 92 C. C. A. 171.

⁵ State v. Newell, 140 Mo. 282, 41 S. W. 751.

ders were taken, since the sale was consummated in the county where the grocer had his grocery.⁶ Where a statute made it an offense to "manufacture or cause the same to be done with intent to sell, or shall sell, or offer to sell," any adulterated wine within the State, an agent for a wine-house located in another State, who took orders for adulterated wine in the State of its enactment, and procured the transportation of the wine directly to the purchaser in the State where he took the orders, was held guilty of a violation of its provisions.⁷ Where adulterated milk was taken to a cheese factory, which from day to day was put into a common vat with the milk of other patrons, and made into cheese, which was sold and the money therefor apportioned among the patrons according to the amount of milk each had delivered, after deducting expenses, it was held there was neither a sale nor exchange of the milk.⁸ Where State inspectors merely testify that, when they stopped the driver of a truck carrying milk, he stated that he was then on his way to deliver the milk to certain places in the city, and there was no proof that it was ever delivered there or anywhere, it was held that no sale was shown.⁹

But a consummated sale to an inspector is as much a sale as to a private individual, and if illegal, subjects the seller to the penalty inflicted by the statute.¹⁰ Yet where it appeared that the defendant declined to accept pay from the agent of the State for a sample which he knew was intended for chemical analysis, and finally only accepted some payment on his persuasion, such facts were held not to show a sale.¹¹

⁶ *Commonwealth v. Gardner*, 16 Montg. Co. Law Repr. 171.

⁷ *Myer v. State*, 10 Ohio Cir. Ct. Rep. 226.

⁸ *Flander v. People*, 4 Alb. L. Jr. 316.

⁹ *People v. McDermott*, 38 N. Y. Misc. Rep. 365, 77 N. Y. Supp. 888.

¹⁰ *People v. Greenberg*, 134 N. Y. App. 599, 119 N. Y. Supp. 325.

In this case it was held that the statute applied to jobbers and middlemen.

¹¹ *Dinkelbühler v. State*, 7 Ohio Dec. 99, 4 Ohio N. P. 96.

An officer of a corporation testified to sales of uncolored oleomargarine to the defendant, based on the charge tickets, which he testified were the original entries, and

§ 559. Knowledge of Adulteration of Milk.

In prosecutions for the sale of adulterated milk, or keeping for sale, it is no defense that the accused had no knowledge it was adulterated; and it need not be alleged or proven that he had such knowledge, in the absence of special words in the statute requiring the sale to be made with knowledge of the adulteration. In such instances knowledge is not an affirmative element in the offense.¹ In a New York case the statute² made the simple omission of things directed or commission of things prohibited evidence of the violation of the Act. This provision was held to render the act of sale of adulterated milk without knowledge of its adulteration an offense. In speaking of the provision, the court said: "There

also that drafts were drawn on defendant for each shipment, all of which, as shown by the company's ledger, had been paid. An officer of the bank through which the drafts were drawn testified as to passage through the bank. This was held to show a payment for the oleomargarine. *Hart v. United States*, 183 Fed. 368.

¹ *Commonwealth v. Nichols*, 10 Allen 199; *Commonwealth v. Farren*, 9 Allen 489; *State v. Smith*, 10 R. I. 258; *Isenhour v. State*, 157 Ind. 517, 62 N. E. 40, 87 Am. St. 228; *People v. Friedman*, 138 N. Y. App. 29, 122 N. Y. Supp. 500; affirmed 200 N. Y. 591, 94 N. E. 1096; *Commonwealth v. Granstein & Co. (Mass.)*, 95 N. E. 97.

The same rule applies to sales of intoxicating liquors. *Commonwealth v. Boynton*, 2 Allen 160; *Commonwealth v. Goodman*, 97 Mass. 117; *Commonwealth v. Hallett*, 103 Mass. 452. So a sale of naphtha. *Commonwealth v. Wentworth*, 118 Mass. 441; *State v. Schlenker*, 112 Iowa 642, 84 N. W.

698, 51 L. R. A. 347; *Myer v. State*, 10 Ohio Cir. Ct. Rep. 226 (agent ignorant); *Myer v. State*, 3 Ohio Dec. 198. Returning to sales of milk, we have *Commonwealth v. Warren*, 160 Mass. 533, 36 N. E. 308; *Seattle v. Erickson*, 55 Wash. 675, 104 Pac. 1128; *Commonwealth v. Nichols*, 10 Allen 199; *Commonwealth v. Evans*, 132 Mass. 11; *People v. Schaeffer*, 41 Hun 23; *Commonwealth v. Gray*, 150 Mass. 327, 23 N. E. 47; *Vandergrift v. Miehl*, 66 N. J. L. 92, 49 Atl. 16; *Commonwealth v. McCance*, 176 Mass. 292, 57 N. E. 603; *Commonwealth v. Bowers*, 140 Mass. 483, 5 N. E. 469; *People v. Laesser*, 79 N. Y. App. Div. 384, 79 N. Y. Supp. 470; *Commonwealth v. Evans*, 132 Mass. 11; *People v. West*, 106 N. . 293, 12 N. E. 610, 60 Am. Rep. 452; *People v. Cipperly*, 101 N. Y. 634, 4 N. E. 107; *People v. Kibler*, 106 N. Y. 321, 12 N. E. 795; *People v. Eddy*, 59 Hun 615, 12 N. Y. Supp. 628.

² Acts 1885, ch. 458, § 17.

remains no reasonable doubt of the legislative meaning and the constitutional power to so enact we distinctly opine. The prudence of its exercise may be debatable but it is not indefensible. It is meritorious that the adulteration of food products has grown to proportions so enormous as to menace the health and safety of the people. Ingenuity keeps pace with greed, and the careless and heedless consumers are exposed to increasing perils. To redress such evils is a plain duty but a difficult task. Experience has taught the lesson that repressive measures which depend for their efficiency upon proof of the dealer's knowledge and of his intent to deceive and defraud are of little use and rarely accomplish their purpose. Such an emergency may justify legislation which throws upon the seller the entire responsibility of the purity and soundness of what he sells and compels him to know and to be certain."³ In a Pennsylvania case it was said of a statute with regard to the sale of oleomargarine: "The prohibition is absolute and general. It could not be expressed in terms more explicit and comprehensive. The statutory definition of the offense embraces no word implying that the forbidden act shall be done knowingly or wilfully, and, if it did, the design and purpose of the act would be practically defeated. The intention of the Legislature is plain that persons engaged in the traffic shall engage in it at their peril, and they can not set up their ignorance of the nature and qualities of the commodities they sell as a defense."⁴ If the milk be below the standard, it is no defense that it was just as it came from the cow, and the defendant did not know of its low grade.⁵ But a statute, by the use of words, such as selling or offering for sale adul-

³ *People v. Kibler*, 106 N. Y. 321, 12 N. E. 795; *People v. Cipperly*, 101 N. Y. 634, 4 N. E. 742, 37 Hun 323.

⁴ *Commonwealth v. Weiss*, 139 Pa. 247, 21 Atl. 10, 23 Am. St. 182, 11 L. R. A. 530, note. So in *Indiana, Isenhour v. State*, 157 Ind. 517, 62 N. E. 40, 87 Am. St. 228;

Strong v. State, 2 Ohio N. P. 93, 3 Ohio Dec. 284; *Bissman v. State*, 9 Ohio Cir. Ct. Rep. 714; *State v. Kelly*, 53 Ohio St. 667, 43 N. E. 163.

⁵ *People v. Bosch*, 129 N. Y. App. 660, 114 N. Y. Supp. 65; *Commonwealth v. Vieth*, 155 Mass. 442, 29 N. E. 577.

terated milk, knowing it to be such, makes knowledge of the adulteration an ingredient of the offense, and it must be averred and proven.⁶

§ 560. Ignorance of Adulteration of Food.

Whether or not a knowledge of the adulterated or unwholesome condition of the article of food sold or offered for sale is necessary to render the vendor liable to a statute prohibiting the sale of adulterated or unwholesome food depends upon the wording of the statute. Thus where it is made an offense to sell adulterated food, and the statute does not use the word "knowingly" in connection with the word "sell," there are many cases (as we have seen in the next preceding section concerning sales of milk), which hold that it is not necessary to the violation of the statute that a sale shall be made knowing at the time that the article sold is adulterated or unwholesome. A mere sale of such food in the utmost ignorance of its condition constitutes the offense and renders the vendor liable to a penalty.¹ Thus

⁶ *Sanchez v. State*, 27 Tex. App. 14, 10 S. W. 756; *Cantee v. State*, 10 S. W. 757; *Commonwealth v. Flannelly*, 15 Gray 195; *Verona Central Cheese Co. v. Murtaugh*, 50 N. Y. 314.

Where it need not be averred that the defendant knew the milk he sold was adulterated, if it be averred he had such knowledge, that fact need not be proven. *Commonwealth v. Farren*, 9 Allen 489.

In a prosecution for selling adulterated milk an instruction that if the accused sold milk to A, and delivered to his servant, who delivered it to A in the same condition in which he received it from the accused, and that it was then found by satisfactory tests that the milk was adulterated, the accused was guilty, is erroneous, for the milk

may have been adulterated when received from accused, and still he may not have done it, or have had any knowledge of it. *Dilley v. People*, 4 Bradw. (Ill.) 52.

¹ *Newton v. Connell*, 9 N. J. L. Jr. 316; *Waterbury v. Newton*, 50 N. J. L. 534; *People v. Schaeffer*, 41 Hun 23; *People v. Mahaney*, 41 Hun 26; *Bissman v. State*, 9 Ohio Cir. Ct. Rep. 714; *Myer v. State*, 10 Ohio Cir. Ct. Rep. 226; *Myer v. State*, 3 Ohio Dec. 198; *Strong v. State*, 3 Ohio Dec. 284, 2 Ohio N. P. 93; *State v. Kelly*, 54 Ohio St. 166, 43 N. E. 163; *Commonwealth v. Weiss*, 139 Pa. St. 247; 21 Atl. 10, 27 Wkly. N. C. 182, 23 Am. St. 182; *State v. Roger*, 95 Me. 94, 49 Atl. 564; *People v. Hillman*, 58 N. Y. 571, 69 N. Y. Supp. 66, 15 N. Y. Cr. Rep. 394;

where a statute prohibited the sale of any substance made in imitation of yellow butter and not made exclusively of cream or milk, it was held that the prosecution need not prove, on the trial for a violation of the statute, that the defendant had knowledge that the compound sold by him was not made exclusively of milk or cream or intended to deceive the purchaser.² So the intention to imitate the color of natural butter need not be shown in a prosecution to prohibit the sale of oleomargarine manufactured in imitation of natural butter, for it is immaterial.³ In such an instance the dealer can not shield himself by showing his ignorance in regard to its character.⁴ Nor is evidence of the habitual good character of the defendant admissible.⁵ "The distribution of impure or adulterated food for consumption," said the Supreme Court of Indiana, "is an act perilous to human life and health; hence, a dangerous act, and can not be made innocent and harmless by the want of knowledge or the good faith of the seller."⁶ Continuing the

Betta v. Armstead, 20 Q. B. Div. 771, 52 J. P. 471, 57 L. J. M. C. 100, 58 L. T. 811, 36 W. R. 720 16 Cox C. C. 418; *People v. Snowburger*, 113 Mich. 86, 64 Am. St. 449, 71 N. W. 497; *Pain v. Boughtwood*, 24 Q. B. Div. 353, 54 J. P. 469, 59 L. J. M. C. 45, 62 L. T. 284, 38 W. R. 428, 16 Cox C. C. 747; *Dyke v. Gower* [1892], 1 Q. B. 220, 56 J. P. 168, 61 L. J. M. C. 70, 65 L. T. 760, 17 Cox C. C. 421; *Morris v. Corbett*, 56 J. P. 649; *Spiers and Rand v. Bennett* [1896], 2 Q. B. 65, 60 J. P. 437, 65 L. J. M. C. 144, 74 L. T. 697, 44 W. R. 510, 18 Cox C. C. 332.

² *State v. Rogers*, 95 Me. 94, 49 Atl. 564.

³ *People v. Hillman*, 58 N. Y. App. Div. 571, 69 N. Y. Supp. 66, 15 N. Y. Cr. Rep. 394; *People v. Mahaney*, 41 Hun 26.

⁴ *State v. Rippeth*, 71 Ohio St. 85, 72 N. E. 298; *People v. Meyer*, 44 N. Y. App. Div. 1, 60 N. Y. Supp. 415; *State v. Ryan*, 70 N. H. 196, 85 Am. St. 629, 46 Atl. 49; *State v. Cornish*, 66 N. H. 329, 330, 21 Atl. 180, 11 L. R. A. 191; *State v. Campbell*, 64 N. H. 402-405, 13 Atl. 585; *Commonwealth v. Uhrig*, 138 Mass. 492; *Commonwealth v. Savery*, 145 Mass. 212, 13 N. E. 611; *State v. Smith*, 10 R. I. 258; *State v. Hughes*, 16 R. I. 403, 16 Atl. 911; *Lansing v. State*, 73 Neb. 124, 102 N. W. 254; *Groff v. State*, 171 Ind. 547, 85 N. E. 769; *Altschul v. State*, 8 Ohio Cir. Ct. Rep. 214.

⁵ *Commonwealth v. Kolt*, 13 Pa. Super. Ct. Rep. 347.

⁶ *Groff v. State*, 171 Ind. 547, 85 N. E. 769; *State v. Engle*, 156 Ind. 339, 58 N. E. 698; *Commonwealth v. Gray*, 150 Mass. 327, 23 N. E.

court said: "Guilty intent is not an element of the crime; hence, the rule that governs in that larger class of offenses, which rests upon criminal intent, has no application here. Cases like this are founded largely upon the principle that he who voluntarily deals in perilous articles must be cautious how he deals."

§ 561. Ignorance of Adulteration of Food, Continued.

A statute may interject the element of knowledge into the commission of an offense in the sale or exposing for sale of adulterated food; and when that is the case, knowledge of the qualities of the food by the vendor must be shown before he can be convicted.¹ Thus a statute which provides that every person who shall willfully sell or offer for sale the flesh of any calf less than four weeks old when killed

47; *State v. Schlenker*, 112 Iowa, 642, 84 N. W. 698, 51 L. R. A. 347, 84 Am. St. 360; *People v. Kibler*, 106 N. Y. 321, 12 N. E. 795; *People v. Worden Grocery Co.*, 118 Mich. 604, 77 N. W. 315; *Commonwealth v. Weiss*, 139 Pa. 247, 21 Atl. 10, 11 L. R. A. 530, 23 Am. St. 182; *Engle v. Nowlin*, 94 Fed. 646; *State v. Rogers*, 95 Me. 94, 49 Atl. 564, 85 Am. St. 395; *Fox v. State*, 94 Md. 143, 50 Atl. 700, 89 Am. St. 419; *State v. Ryan*, 70 N. H. 196, 46 Atl. 49, 85 Am. St. 629.

¹ An act done ignorantly is no excuse for the violation of a statute,—as cutting out a brand. *Smith v. Brown*, 1 Wend. 231.

Accidental adulteration is no defence. *Commonwealth v. Granstein & Co. (Mass.)*, 95 N. E. 97. See also *People v. Friedman*, 138 N. Y. App. Div. 29, 122 N. Y. Supp. 500; affirmed 200 N. Y. 591, 94 N. E. 1096.

In Australia it was held that the

analyst's certificate that the milk sold was below standard made a prima facie case, and that the defendant might then show that he sold the milk in good faith, believing it was up to the standard and pure. *Kench v. O'Sullivan*, 10 N. S. W. L. R. 605, 27 W. N. (N. S. W.) 137, following *Ex parte Wedlock*, 20 N. S. W. L. R. 353, 16 W. N. (N. S. W.) 117, and *Wolffenden v. McCulloch*, 92 L. T. 857.

¹ *Commonwealth v. Smith*, 103 Mass. 444; *Bainbridge v. State*, 30 Ohio St. 264; *Phillips v. Meade*, 75 Ill. 334; *Commonwealth v. Flannelly*, 15 Gray 195; *Kelly v. State*, 1 Ohio N. P. 238, 2 Ohio Dec. 239; *State v. Snyder*, 44 Mo. App. 429; *Verona Central Cheese Co. v. Murtaugh*, 50 N. Y. 314, reversing 4 Lans. 17; *Teague v. State*, 25 Tex. App. 577, 8 S. W. 667; *Fitzgerald v. Leonard*, 32 L. R. Irish Rep. 675.

shall be fined makes knowledge an essential element of the crime defined by it; and it is error for the court to charge that by "willfully selling" was meant deliberately selling, without regard to the defendant's motive.² So on a prosecution for selling adulterated molasses, it was held that the accused could show that he purchased it believing it to be pure, and in good faith sold it as such without intent to deceive.³ There are also decisions which hold knowledge an element of the crime, although the words "knowingly" or "willfully" be not used in defining the crime. In Indiana a statute provided that "Whoever kills, for the purpose of sale, any sick, diseased or injured animal, or who sells or has in his possession with intent to sell, the meat of any such sick or diseased or injured animal, shall be fined." An indictment charged that the defendant "unlawfully had in his possession, with intent then and there to sell the same the meat of certain sick, diseased or injured animals, to wit: the meat of certain hogs." The Supreme Court held this affidavit insufficient, because it did not charge that accused had knowledge of the character or bad quality of the animals or meat, and that it was not enough to charge the offense in the language of the statute. "We are clear that by the statute in question," said the court, "it was not intended to punish acts done in ignorance of the character or deleterious quality of the animals or meat. Before a conviction can be had under the law, then, it must appear that the animals were killed for the purpose of sale for food, or the meat sold or had in possession with intent to sell for such purpose, and that the accused had knowledge of the bad qualities of the animals or meat." Then speaking of the indictment, it said: "The language of the statute here is general, but it was intended to include those only who had knowledge; hence knowledge must be averred. So the language is general in respect to the purpose of sales, or intended sales, but the intention was to prohibit sales for food;

² *State v. Nussenholtz*, 76 Conn. 92, 55 Atl. 589.

³ *Kelly v. State*, 1 Ohio N. P. 238, 2 Ohio Dec. 239.

hence a sale, or intended sale, for food should be averred.”⁴ In another case a statute came under review which made it an offense to “knowingly barter, give away, sell or have in his possession with intent to sell, any substance injurious to health.” The defendant was charged with having “in his possession, with intent to sell the same, a certain substance intended for food, to wit, one pint of milk then and there adulterated with a certain substance injurious to health, to wit, formaldehyde.” The defendant sought to show what representations had been made to him concerning the use of formaldehyde in the milk which he had purchased and which he had in his possession with intent to sell, as charged in the indictment. The court held it was error to exclude this evidence, as the trial court had done. “While the possession of milk recently adulterated with a substance injurious to health,” said the court, “required appellant [the defendant] to show affirmatively that such adulteration was without his knowledge, yet, he was entitled to the fullest opportunity to do so. If in fact he had no knowledge, and had a sufficient excuse for want of knowledge, he was entitled to show it. The law will not permit the State to construct about the defendant a circumstantial case, and then deny him an opportunity to explain the circumstances consistently with his innocence. If appellant used the preserver, honestly believing, after making reasonable inquiry and investigation, that it contained no formaldehyde or other substance injurious to health, then he was not guilty of ‘knowingly,’ etc. What he did to ascertain the fact about it, who he inquired of, what was said to him by others in whom he might reasonably confide, what was exhibited to him, in writing or printing, and the trustworthiness thereof, were all proper subjects to lay before the jury in explanation of his assertion that he did not, at the time, know the milk contained a substance injurious to health; and if the facts he was thus able to show should be sufficient to overcome the presumption of guilty knowledge raised by the

⁴ Schmidt v. State, 78 Ind. 41.

possession, it would have been the duty of the jury to acquit."⁵ Where it is an offense to expose meat for sale that is unfit for food, the offense is committed by the exposure of such meat although the person exposing it was unaware that it was unfit for food.⁶

§ 562. Lack of Knowledge of Adulteration Lessening Penalty.

Although a sale of adulterated food without knowledge of its adulteration is no offense, unless the statute makes knowledge of the adulteration an element of the offense, yet the defendant is entitled to show that fact as bearing upon the amount of penalty to be assessed against him; for it is reasonable that one who wilfully violates a statute should be assessed with a greater penalty than he who inadvertently violates it. Of course, this rule can have no application where the statute fixes the exact amount of penalty to be assessed upon proof of a violation of its terms.¹

§ 563. Article Sold to the Prejudice of Purchaser—Actual Damage.

An English statute makes it an offense to sell "any article of food or any drug which is not of the nature, substance and quality of the article demanded by such purchaser," "to the prejudice of the purchaser."¹ A misrepresentation concerning the article of food or drug, or a failure to disclose by proper label or notice its true constituent elements is considered a sale "to the prejudice of the purchaser." Under this statute the question has arisen as to whether, in order to show that the article was sold to the prejudice of the purchaser it is necessary to prove that the purchaser had

⁵ *Isenhour v. State*, 157 Ind. 517, 62 N. E. 40, 87 Am. St. 228. See also *People v. Fulle*, 1 N. Y. Cr. Rep. 172.

⁶ *Hobbs v. Winchester Corporation*, 79 N. J. K. B. 1123 [1910], 2

K. B. 271, 102 L. T. 841, 74 J. P. 413, 8 L. G. R. 1072, 26 T. L. R. 557.

¹ *People v. Secor* (N. Y. App.), 113 N. Y. Supp. 487.

¹ 38 and 39 Vict., ch. 63, § 6.

suffered actual prejudice or damage. In one case it was held that an official purchasing an article of food as a sample for analysis, and not for consumption, or at his own expense, could not be prejudiced by the purchase;² but in another case the opposite view was taken, and the seller held liable.³ In the latter case Judge Mellon said: "If a purchaser, whoever he may be, . . . gets an article inferior to that which he demands and pays for, it seems to me that he is necessarily prejudiced within the meaning of the section [of the statute]. . . . The real offense is the fraudulent sale of an article adulterated so as to be of an inferior nature, etc., to that which is demanded and paid for. The necessity for the words 'to the prejudice of the purchaser' is this: but for those words various absurdities might arise. . . . The sale of an article of a superior nature or quality to that demanded, would be an offense." Judge Lush also said: "What is the meaning of 'prejudice'? It can not be confined to pecuniary prejudice, or prejudice arising from the consumption of unwholesome food. The prejudice is that which the ordinary customer suffers, viz., that which is suffered by any one who pays for one thing and gets another of inferior quality. . . . The words 'to the prejudice of the purchaser' are necessary, because if they had not been inserted, a person might have received a superior article to that which he demanded and paid for, and yet an offense would have been committed. The result is, that it is never necessary to prove any actual damage to the purchaser in order to obtain a conviction under this statute, and that the words 'to the prejudice of the purchaser' are only inserted to prevent such an absurdity as a prosecution for selling a better article than the one demanded."⁴ It is not

² Davidson v. McLeod, 42 J. P. 43, 5 Rettie (J. C.) 1, 3 Coup. 511.

³ Hoyle v. Hitchman, 4 Q. B. Div. 233, 43 J. P. 431, 48 L. J. M. C. 97, 40 L. T. 252, 27 W. R. 487.

As a result of these two decisions

Parliament adopted a statute declaring that it should not be a defence that the article of food or drug was purchased for an analysis. 42 and 43 Vict., ch. 30, § 2.

⁴ Hoyle v. Hitchman, *supra*. See also Pearks, Gunston & Tee v.

necessary for the purchaser to request the dealer to furnish him with a pure and unadulterated article of food; for when he asks the dealer for food there is a tacit implication that there is a request for a pure article. "A man who asks for 'milk' prima facie asks for normal milk from the cow. There was no need for the purchaser buying milk from a milkman on his rounds to add any descriptive adjective or to demand that the milk should be of any standard or quality."⁵

§ 564. The Article Demanded—Sale to Prejudice of Purchaser.

An English statute makes it an offense to "sell to the prejudice of the purchaser any article of food or any drug which is not of the nature, substance, and quality of the article demanded by such purchaser."¹ In construing this section the words "nature, substance, and quality" can not be disjoined, and the article sold must be different in all three respects from the article demanded. As the statute was intended to strike only at foreign admixtures, the very nature of the substance must be altered, or the offense contemplated can not be committed.² "The article demanded" is the article known commercially under that name. Thus a merchant sold as gin a liquid composed of 26 percent of alcohol, 70 percent of water, and 4 percent of sugar. It was proved that gin was sold by retailers at a strength varying

Ward [1902], 2 K. B. 1, 66 J. P. 774, 71 L. J. K. B. 656, 87 L. T. 51.

A sale "to the prejudice of the purchaser" takes place when the purchaser is supplied with an article containing but little of the article of food he demanded. *Rider v. Freebody*, 24 Vict. L. R. 429, 20 Aust. L. T. 115, 4 Aust. L. R. 251.

The fact that the purchaser was informed of the adulteration immediately after he had paid for the article and before the vendor and

he had separated, will not relieve the vendor of the penalty of the statute. *Rider v. Bachus Marsh, etc. Co* [1905], Vict. L. R. 147, 26 Aust. L. T. 156, 11 Aust. L. R. 37.

⁵ *Kench v. O'Sullivan*, 10 N. S. W. 605, 27 W. N. (N. S. W.) 137, denying the soundness of *Lane v. Collins*, 14 Q. B. Div. 193, 49 J. P. 89, 54 L. J. M. C. 75, 52 L. T. 257, 33 W. R. 365.

¹ 38 and 39 Vict., ch. 63, § 6.

² *Davidson v. McLeod*, 42 J. P. 43, 5 *Rettie* (J. C.) 1, 3 *Coup*. 511.

from proof to 20 degrees under proof. This liquid was 44 degrees under proof, and although the analyst said he should call it gin whose alcoholic strength was exceedingly low, the justice trying the case convicted the vendor. The High Court upheld the conviction, saying: "This was not an article of the nature, substance, and quality of the article demanded by the purchaser. . . . The justices have come to the conclusion that a mixture of alcohol and water so far as 44 percent below proof is not of the quality of gin as known commercially. . . . It is impossible for us to say that they were wrong."³ In another case a grocer was prosecuted for selling a variety of tapioca as sago. The justices found that the public and the trade generally knew this substance as sago, and that there was no appreciable difference in cost between the two. It was held that no offense had been committed.⁴ If the article demanded has no recognized standard of quality or composition, it is no offense against this statute to sell an article which does not come up to a particular standard.⁵ In another case, speaking of a sale of cream, the court said: "The article demanded and supplied was cream. It was admitted that it contained no foreign admixture or adulteration, but it was cream of an inferior quality to that ordinarily sold in Glasgow. Cream is not an article having any standard of quality. It varies with the character of cows from which milk comes and the food on which they are fed. This was genuine cream though of inferior quality. It appears to me that a sale in such a case was not an offense within the Act at all."⁶ In the present case the article demanded was milk; that supplied was milk and water. It was an adulterated article."⁷ So the sale of an inferior, though pure, quality of cream at a low

³ *Pashler v. Stevenitt*, 41 J. P. 136, 35 L. T. 862.

⁴ *Sandys v. Rhodes*, 67 J. P. 352.

⁵ *Roberts v. Leeming*, 69 J. P. 417, 3 L. G. R. 1031; *Wilson v. McPhee*, 68 J. P. 175, 6 *Fraser (J. C.)* 10, 4 *Adams* 310, 41 *Sc. L. R.* 195.

⁶ Referring to *Davidson v. McLeod*, *supra*.

⁷ *Hoyle v. Hitchman*, 4 Q. B. Div. 233, 43 J. P. 431, 48 L. J. M. C. 97, 40 L. T. 252, 27 W. R. 487.

price, is no offense.⁸ So where marmalade was sold which contained 13 percent of glucose instead of cane or beet sugar; and evidence was given showing that for many years glucose had been used by some marmalade manufacturers, but not by all, and that its use had a tendency to prevent mildew, it was held that there was no evidence to show that this substance was not "marmalade."⁹ An accidental introduction of deleterious matter into an article sold for food does not of necessity make it different in nature, substance and quality from the article demanded.¹⁰ But if an article sold be altogether different from that which was demanded by the purchaser, an offense is committed, as where saffron was asked for and savin supplied.¹¹ The question whether the article sold is the article demanded by the purchaser is one of fact for the court or jury trying the case.¹² In determining this question of fact, the court or jury, in England, are entitled to use any special knowledge that they may possess as to what is known commercially under any particular name, even though no evidence may be forthcoming upon the point. Thus where a grocer had sold a packet of cocoa containing 80 percent of starch and sugar; and the justices, who were all retired naval officers, had a large experience of cocoa, which formed one of the regular rations on board naval ships; and acting on the knowledge so acquired, and without hearing any evidence concerning the composition of cocoa as sold commercially, came to the conclusion that the starch and sugar had not been added fraudulently, notwithstanding the fact that the analyst had cer-

⁸ *Morton v. Green*, 8 *Rettie* (J. C.) 36, 4 *Coup*. 437.

⁹ *Smith v. Wisden*, 66 J. P. 150, 85 L. T. 760; *Wilson v. McCutcheon*, 4 *Adam* 34, 40 *Sc. L. R.* 31.

¹⁰ *Goulder v. Rook* [1901], 2 K. B. 290, 65 J. P. 646, 70 L. J. K. B. 747, 84 L. T. 719, 49 W. R. 684; *Bent v. Ormerod* [1901], 2 K. B. 290, 65 J. P. 646, 70 L. J. K. B. 747, 84 L. T. 719, 49 W. R. 684.

¹¹ *Knight v. Bowers*, 14 Q. B. Div. 845, 49 J. P. 614, 54 L. J. M. C. 108, 53 L. T. 234, 33 W. R. 613, 15 *Cox C. C.* 728.

¹² *Webb v. Knight*, 2 Q. B. Div. 530, 41 J. P. 726, 46 L. J. M. C. 264, 36 L. T. 791, 26 W. R. 14; *Friend v. Mapp*, 68 J. P. 589, 2 L. G. R. 1317; *Goulder v. Rook*, *supra*; *Pashler v. Stevenitt*, *supra*.

tified that the cocoa was adulterated, and being of the opinion that the offense, if any, was quite trifling, and discharged the vendor, their action was approved by the High Court.¹³ So in an instance of caper tea, and the analysis showed that the sample in question was adulterated with 3.5 percent of animal matter; and in the cross examination of the analyst, a report of the authorities at Somerset House, the official chemical office of England, on the subject of caper tea was put to him with a view to showing that extraneous matter was necessarily present in caper tea, owing to its method of production, it was held that the justices committed no error in reading and acting upon it, though rightly refusing to admit it in evidence.¹⁴ A milk dealer had on his cart in fairly large letters the words "Containing Preservatives." The plaintiff bought milk from him which was taken from a can in the cart. Plaintiff did not know of the words on the cart until after he had received the milk and paid for it, when the defendant called his attention to them. The milk contained boric acid. It was held that the sale was to the prejudice of the purchaser, the fact that there was a notice which the plaintiff might have read but which he did not read or know of until the sale was completed was no defense.¹⁵ A sale "to the prejudice of the purchaser" takes place when the purchaser is supplied with an article containing little, if any, of the article of food demanded by him.¹⁶

§ 565. Exposure for Sale.

Not infrequently statutes make it an offense to expose for sale adulterated food. This is especially true of oleomar-

¹³ *Regina v. Field*, 64 L. J. M. C. 158.

¹⁴ *Shortt v. Robinson*, 68 L. J. Q. B. 352, 63 J. P. 295, 80 L. T. 201, 19 Cox C. C. 243.

¹⁵ *Rider v. Bachus Marsh, etc.* Co. [1905], Vict. L. R. 147, 26 Aust. L. T. 156, 11 Aust. L. R. 37.

¹⁶ *Rider v. Freebody*, 24 Vict. L. R. 429, 20 Aust. L. T. 115, 4 Aust. L. R. 251; *Rider v. Bachus Marsh, etc. Co.* [1905], Vict. L. R. 147, 26 Aust. L. T. 156, 11 Aust. L. R. 37.

garine and adulterated milk. Exposing for sale means an actual exposure to the public. Therefore, where a grocer kept oleomargarine in imitation of butter for sale in his store, in a closed and covered refrigerator, so that it could not be seen by his customers, it was held that proof of such facts did not justify a conviction of having made "an exposure for sale" within the meaning of the statute.¹ Upon a prosecution for a failure to supply a sample of food for analysis, as a statute required, it was held error to refuse evidence to show that the defendant did not expose for sale the article forming the basis of the prosecution.² Where an inspector was served with a portion of margarine cut off a parcel of the substance which was lying on the counter concealed by a screen in such a manner as to be invisible to a customer in the shop; and the portion so handed to the inspector was wrapped in the wrapper required by the statute with the statutory marks thereon, it was held that the parcel of margarine so concealed by the screen was not "exposed for sale," and, therefore, needed no label.³ In another case there was a notice in a shop window advertising "Danish Butter." An inspector went in and asked for some. On the counter there was a heap of paper parcels, each of which had the word "Margarine" printed on it. One of these was handed to the inspector, and was found to contain margarine. The shopkeeper was prosecuted for neglecting to attach to the heap the label required by the statute, and the court dismissed the case, holding, on the authority of the case just cited, that the margarine being wrapped in paper, and, therefore invisible to the purchaser, was not "exposed for sale" within the meaning of the statute. But on appeal the case was reversed on the ground that the lower court had taken an erroneous view of that case, one of the judges saying: "I entirely agree with the decision in *Crane v. Lawrence*, which was, in effect, that there was no exposure for sale

¹ *Commonwealth v. Byrnes*, 158 Mass. 172, 33 N. E. 343.

² *Margolius v. State*, 1 Ohio N. P. 264.

³ *Crane v. Lawrence*, 25 Q. B. Div. 152, 54 J. P. 474, 59 L. J. M. C. 110, 63 L. T. 197, 38 W. R. 620, 6 T. L. R. 370.

when the margarine was stored in a back room or cellar. The decision is simply that margarine which can not in any sense be seen by the purchaser is not exposed for sale. In this case, the justices refused to convict the defendant on the ground that "the second part of section six [that part requiring the wrapper to have on it the word 'Margarine'] does not apply to margarine which is wrapped up in paper. That, in my opinion, is a wrong view of the section. The expression 'exposed for sale' is a well-understood term, and can not be limited so as to mean only 'exposed to view'."⁴ Where slices of bread, spread with a mixture of Danish butter and margarine, were sold for consumption on the premises, and also haddocks, on which was put margarine cut from a lump kept on a shelf, it was held that the margarine had not been exposed for sale by retail.⁵ "The question comes to this: was the case one in which margarine was exposed for sale by retail . . .? In order to arrive at a conclusion as to this, one must read the concluding portion of the section."⁶ . . . That shows what the character of the sale intended to be dealt with by the section is; and it is perfectly obvious that the machinery provided by the section is inapplicable to the course of business as it is carried out at this establishment. It would be absurd to apply the provision as to using a wrapper to each separate piece of margarine when spread on the bread or used with the haddock."⁷

⁴ *Wheat v. Brown* [1892], 1 Q. B. 418, 56 J. P. 153, 61 L. J. M. C. 94, 66 L. T. 464, 40 W. R. 462, 8 T. L. R. 294.

⁵ *Moore v. Pearce Dining and Refreshment Rooms* [1895], 2 Q. B. 657, 15 Rep. 611, 59 J. P. 805, 65 L. J. M. C. 7, 73 L. T. 400, 44 W. R. 94, 18 Cox C. C. 196.

⁶ "If such margarine be exposed for sale, by retail, there shall be attached to each parcel thereof so exposed, and in such manner as to be clearly visible to the purchaser,

a label marked in printed capital letters not less than one and a half inches square, 'Margarine,' and a person selling margarine by retail, save in a package duly branded or durably marked as aforesaid, shall in every case deliver the same to the purchaser in a paper wrapper, on which shall be printed in capital letters, 'Margarine'". 38 and 39 Vict., ch. 63, § 6.

⁷ *Moore v. Pearce Dining and Refreshment Rooms*, supra.

In an action to recover a penalty for exposing for sale the carcass of a calf under four weeks of age when killed, and which was lying on the floor near the wall when seized, about 6 o'clock a. m., in the defendant's place of business, it appeared that the carcasses of calves were at times delivered at the defendant's place of business in the nighttime and piled upon the floor between business hours, and that when consignments came it was usual to sort out any small carcasses and leave them on the floor pending the arrival of the city inspectors, who called every day, a judgment was held unauthorized.⁸

§ 566. Purpose of Sale.

A statute may require the article sold to be sold for food before an offense is committed. Thus where a statute provided that whoever "sells, or has in his possession with intent to sell, the meat of any" sick or diseased or injured animal, he would be liable to a fine under this statute, the court held to constitute the offense the meat must be sold for food. "The evident object of the provision," said the court, "was to prevent the killing of such animals for the purpose of sale for food, or selling, or having in possession with intent to sell, for food, the meat of such animals. The Legislature evidently did not intend to prevent the killing of such animals with intent to sell, or the selling of the meat, for such purposes as would not affect the public or individual health; and the killing for sale, or the sale of the meat for other harmless purposes, for which it might have a commercial value, was not intended to be interdicted. The statute is to be construed as if the interdict had been put upon the killing for the purpose of sale for food, and the selling or having in possession the meat with intent to sell it for such

⁸ *People v. Steers & Menke* (N. Y.), 113 N. Y. Supp. 486.

A statute providing that no adulterated milk "shall be brought into, held, or offered for sale at any place in the city" does not pro-

hibit the mere possession of adulterated milk. *People v. Timmerman*, 179 N. Y. 550, 71 N. E. 1136, affirming 79 N. Y. App. Div. 565, 80 N. Y. Supp. 285.

purpose."¹ On the other hand it has been held that the use to which the purchaser intended to put veal was not an element of the offense prescribed by a statute forbidding knowingly selling, or having in possession with intent to sell, the meat of a calf killed when less than four weeks old.² Yet when a statute forbade the sale or offer to sell as an article of food any oleaginous substance other than those produced from unadulterated milk or cream, designed to take the place of butter or cheese, it was held necessary to aver in an indictment for selling an oleaginous imitation of butter that it was sold as an article of food.³ Still it has been held that upon a charge of selling unwholesome beef, it was not error for the court to refuse to charge the jury that, if they find the beef was bought as an article of merchandise, and not for domestic consumption, they must acquit.⁴ A sale of food for analysis is as much an offense as a sale of it for consumption.⁵

§ 567. Special Contract as to Quality of Goods.

A statute of England provides that "No person shall, with intent that the same may be sold in its altered state without notice, abstract from an article of food any part of it so as to affect injuriously its quality, substance, or nature, and no person shall sell any article so altered without making disclosure of the alteration."¹ Attempts have been made to evade the provisions of this section by special contracts be-

¹ Schmidt v. State, 78 Ind. 41. It is to be observed that a strong dissent is taken from this view of the law.

² Commonwealth v. Raymond, 97 Mass. 567.

³ State v. Fayette, 17 Mo. App. 587.

⁴ People v. Parker, 38 N. Y. 85, 97 Am. Dec. 774.

That it must be alleged the article manufactured was manufactured as an article of food, where

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the statute made it an offense to manufacture oleomargarine as an article of food, see Commonwealth v. Callahan, 12 Pa. Co. Ct. Rep. 170; Commonwealth v. Schollenberger, 1 Pa. Dist. Rep. 437, 153 Pa. St. 625, 25 Atl. 999; Commonwealth v. Schmidt, 13 Pa. Co. Ct. Rep. 28.

⁵ State v. Rippath, 71 Ohio St. 85 72 N. E. 298.

¹ 38 and 39 Vict., ch. 63, § 9.

tween vendors and purchasers concerning the quality of the article to be delivered by the former, but unsuccessfully. Thus a milk producer contracted to supply milk to a workhouse at a certain price. By the contract the milk was to contain a certain percentage of cream, and it was to be tested on each delivery, and a reduction was to be made in the price in respect of any deficiency in cream. When the daily supply, contained in five cans, was being delivered, the respondent, acting under the statute, procured a sample from each of the five cans, and subsequently laid information in respect of two of the samples, in which they were found to be a large deficiency of cream. It was held that the provisions of the contract concerning the deficiency of cream was immaterial in the determination of the question whether the milk producer had committed an offense under the section quoted.²

§ 568. Purchaser having Knowledge Food is Adulterated.

It is no defense to an action to recover the statutory penalty for adulterating food that the complainants knew it was adulterated when they used it.¹

§ 569. Offered for Sale.

Exposing for sale and offering for sale are distinct acts; and usually made distinct offenses. Thus we have seen that keeping oleomargarine in a closed and covered refrigerator was not an exposure of it for sale.¹ But where it was an offense to offer oleomargarine for sale unless it was plainly

² *Featt v. Walsh* [1891], 2 Q. B. 304, 55 J. P. 726, 60 L. J. M. C. 143, 65 L. T. 82, 39 W. R. 525, 17 Cox C. C. 322.

In the prosecution of a sale of oleomargarine under the New York statute, the gist of the offense is the sale of oleomargarine manufactured or produced "in imitation or semblance of natural butter,"

rather than deceit in the sale of the article. *People v. Teele*, 131 N. Y. App. 87, 115 N. Y. Supp. 212.

¹ *Lammond v. Volens*, 14 Hun 263. See also *Rider v. Bachus Marsh, etc. Co.* [1905], *Vict. L. R.* 147, 26 *Aust. L. T.* 156, 11 *Aust. L. R.* 37.

¹ *Commonwealth v. Byrnes*, 158 *Mass.* 172, 33 *N. E.* 343.

marked so as to establish its true character, it was held not necessary to prove any overt act of offering for sale in an unidentified state; but the mere possession of it, and placing it in a store with other articles held for sale, was sufficient to warrant a jury in deciding that it was offered for sale.² So where it appeared that the defendant was at the time in question doing business as a dealer in milk and cream, that the number on the milk wagon from which the sample was taken corresponded with the number on defendant's license, that the man driving the wagon was in defendant's employ, and that the samples were taken at 6:45 in the morning, while the wagon was being driven through the streets, it was held that the evidence was sufficient that the defendant was selling or offering the cream for sale.³ But where it appeared that adulterated milk was found in defendant's milk wagon, driven by defendant's employee; and it did not appear the driver was selling or delivering milk, or doing anything more than carrying it from Jersey City, where it was received from the shipper, to the defendant's place of business in New York City; and the evidence showed that the defendant returned all the milk to the shipper, it was held that, as it could not be presumed that defendant was engaged in an unlawful act, the evidence was not sufficient to warrant a recovery of the penalty inflicted by the statute.⁴

§ 570. Manufacture or Possession with Intent to Sell.

Where a statute makes it an offense to manufacture or have in possession oleomargarine or butterine with intent to sell it as pure butter, it is not violated by selling an oleaginous substance not the product of the dairy and not made from milk or cream, unless the sale was with the intent to sell such substance as genuine natural butter.¹ A statute provided that "no person shall manufacture, mix or compound with or add to natural milk, cream or butter any

² State v. Dunbar, 13 Or. 591, 11 Pac. 298, 57 Am. Rep. 33.

³ People v. Hills, 64 N. E. App. Div. 584, 72 N. Y. Supp. 340.

⁴ People v. Kellina, 23 N. Y. Misc. 134, 50 N. Y. Supp. 653.

¹ People v. Laning, 40 N. Y. App. Div. 227, 57 N. Y. Supp. 1057.

animal fats, or animal or vegetable oils; nor shall he make or manufacture any oleaginous substance not produced from milk or cream, with intent to sell the same for butter or cheese made from unadulterated milk or cream, or have the same in his possession, or offer the same for sale, with such intent; nor shall any article or substance or compound so made or produced be sold, intentionally or otherwise, as and for butter or cheese, the product of the dairy." It was held that, in order to prove a violation of such statute, it was not sufficient to show that defendant had manufactured oleomargarine by mixing animal fats with natural milk, etc., but the intent to sell the oleomargarine so manufactured as the product of unadulterated milk or cream must also appear.² But where under a Pennsylvania statute it was made an offense to have in "possession with intent to sell" any oleaginous substance designed to take the place of butter or cheese, it was held to be immaterial that the defendant was ignorant that the substance he sold was of the prohibited composition.³ Upon a charge of a sale of milk below the standard prescribed by the statute, it is no defense that it was reduced below the standard by the removal of part of the cream, if the intent to sell was to sell the milk as pure milk, and not as skimmed milk.⁴ Mere possession of adulterated milk is no offense under a statute making it an offense to have possession of such milk with intent to sell or exchange it.⁵ So under a statute making it an offense to adulterate milk with a view to offering it for sale or exchange, it is no offense to merely adulterate it.⁶ Where it

² *People v. Dold*, 63 Hun 583, 18 N. Y. Supp. 643; *People v. Simpson, Crawford Co.*, 62 N. Y. Misc. 240, 114 N. Y. Supp. 945; *People v. Hale*, 62 N. Y. Misc. Rep. 240, 114 N. Y. Supp. 945.

³ *Commonwealth v. Weiss*, 139 Pa. St. 247, 21 Atl. 10, 27 Wkly. N. C. 182, 23 Am. St. 182.

⁴ *Commonwealth v. Bowers*, 140 Mass. 483, 5 N. Y. 469.

⁵ *State v. Smyth*, 14 R. I. 100, 51 Am. Rep. 344.

⁶ *People v. Fauerback*, 5 Parker Cr. Rep. 311. Where defendant was a jobber of candy, and admitted that he had purchased candies from which samples shown to be adulterated were taken, that he had such candies at his place of business, and did not contend that the candy was bought for any other

was made an offense for every article of diseased meat had in possession for sale, it was held that accused was liable to a penalty for each piece of diseased meat from the same animal he had in his possession at the same time.⁷ Keeping rotten eggs to use in the manufacture of bread is forbidden by the New York statute.⁸

§ 571. Resale of Food Purchased under Written Warranty of its Purity.

An English statute provides that a defendant charged with selling adulterated food must be discharged if he satisfactorily prove "that he had purchased the article in question as the same in nature, substance, and quality as that demanded of him by the prosecutor, and with a written warranty to that effect, that he had no reason to believe at the time when he sold it that the article was otherwise, and that he sold it in the same state as when he purchased it."¹ This section does not fit all instances of violations of the pure food law in which it belongs. In determining to what transactions it belongs the test is to see whether the wording of the section will fit the circumstances of the particular offense, or, in other words, whether there has been a sale to the prosecutor following upon a demand by him for an article of a particular nature, substance and quality. If these essentials be not present, the wording of this section does not apply to the case. Thus it is not applicable to an instance of "abstracting from the article of food any part of it," because that offense is not the sale, but the abstraction; although it would be applicable if the food from which the

purpose than for re-sale in the course of his business, it sufficiently appeared that it was kept for sale, within New York City Sanitary Code, Section 68, providing that any person who shall "have for sale" adulterated food in the city of New York, etc. *People v.*

Greenberg, 134 N. Y. App. 599, 119 N. Y. S. 325.

⁷ *Kenn v. Bell* [1910], S. C. (J.) 13.

⁸ *People v. Friedrich*, 138 N. Y. App. Div. 29, 122 N. Y. Supp. 500; affirmed 200 N. Y. 591, 94 N. E. 1096.

¹ 38 and 39 Vict., ch. 63, § 25.

abstraction was made was then sold. Nor would the provisions be applicable to an instance of a refusal to sell food to an inspector, where the statute makes it an offense; for there no sale was consummated.² The question as to what constitutes a "written warranty" has been discussed in a great many cases, and upon several points the minds of the judges have fluctuated, so that it is impossible to state with accuracy what the law is at the present time. The best that can be done is to give the results of the several cases. But in considering the cases two rules must be borne in mind: (1) Where foods are sold by description, the buyer is entitled to treat that description as a warranty that the goods are of the quality described; and (2) a warranty given after the contract of sale has been completed is generally void, for there is no consideration to support it.³ In an instance of a sale of lard containing water, the defendant showed he sold the article in the same condition as it was when he bought it, and that when he purchased it he received an invoice in which it was described as "lard." The court held that the invoice was not a written warranty. "What is required," said Baron Pollock, "by the statute is a writing expressing on the face of it that it is a warranty."⁴ In a case of a sale of milk the defendant purchased the milk under a written contract made with a farmer who supplied it, and who agreed to sell "new and pure milk each and every day for six months." The court held that this contract was not sufficient to protect him. "It seems clear," said Coleridge, C. J., "that the Legislature meant that a person seeking to protect himself against the penalty, and

² *Elliott v. Pilcher* [1901], 2 K. B. 817, 65 J. P. 743, 70 L. J. K. B. 795, 85 L. T. 50, 20 Cox C. C. 18, *Watts v. Stevens* [1906], 2 K. B. 323, 70 J. P. 418, 75 L. J. K. B. 828, 95 L. T. 200, 4 L. G. R. 821; *Kelly v. Lonsdale* [1906], 2 K. B. 486, 70 J. P. 441, 75 L. J. K. B. 822, 95 L. T. 427, 4 L. G. R. 949.

³ Consult *Roscorla v. Thomas*, 3 Q. B. 234, 11 L. J. Q. B. 214.

⁴ *Rook v. Hopley*, L. R. 3 Exch. Div. 209, 42 J. P. 551, 47 L. J. M. C. 118, 38 L. T. 649, 26 W. R. 663. The soundness of this decision may well be doubted, as will appear upon a view of the cases to follow.

wishing to make himself perfectly safe in respect of the sale of a specific article, must show that he had a proper specific warranty in writing in respect of the article from the vendor. The appellant has not shown that. It is possible he may have a parol statement, amounting to a warranty, from his vendor each morning that the milk was supplied, but that would not be sufficient." He further added that he was of the opinion that the contract relied upon was "not a written warranty within the meaning of the Act."⁵ In a prosecution for selling milk from which the cream had been abstracted, the defendant produced a written contract containing these words: "The vendor hereby warrants each and every supply of milk to be pure, genuine and new milk, unadulterated and with all the cream on," and on each of the cans delivered there was a printed label with the words "warranted genuine new milk with all its cream on," and the justice trying the case found as a fact that the milk in the can was delivered in pursuance of the contract. This was held by the High Court to show a good defense, the court saying: "In the agreement there was a written warranty that the milk to be delivered was to be pure, genuine, and new milk . . . and the fact that the milk was not to be delivered all at one time does not, to my mind, make any difference."⁶

⁵ Harris v. May, 12 Q. B. Div. 97, 48 J. P. 261, 53 L. J. M. C. 39.

This case was discussed in Laidlaw v. Wilson [1894], 1 Q. B. 74, 63 L. J. M. C. 37, 42 W. R. 78, not followed in Elliott v. Pilcher [1901], 2 K. B. 817, 65 J. P. 743, 70 L. J. K. B. 795, 85 L. T. 50, 20 Cox C. C. 18, dissented from by several of the judges in Bacon v. Callow Park Dairy Co., 66 J. P. 804, 87 L. T. 70, 18 T. L. R. 573 (dissent explained and modified in Watts v. Stevens [1906], 2 K. B. 323, 70 J. P. 418, 75 L. J. K. B. 828, 95 L. T. 200, 4 L. G. R. 821, and in Evans v. Weatheritt [1907],

2 K. B. 80, 71 J. P. 228, 76 L. J. K. B. 628, 96 L. T. 641, 23 T. L. R. 424, 21 Cox C. C. 415, 5 L. G. R. 608), and approved in Watts v. Stevens [1906], 2 K. B. 323, 70 J. P. 418, 75 L. J. K. B. 828, 95 L. T. 200, 4 L. G. R. 821.

⁶ Farmers', etc. Dairy Co. v. Stevenson, 55 J. P. 407, 6 L. J. M. C. 70, 63 L. T. 776, 17 Cox C. C. 201. This case is fully discussed by Justice Cove in Iorns v. Van Tromp, 59 J. P. 246, 64 L. J. M. C. 171, 72 L. T. 449, 18 Cox C. C. 132.

The case of Hutchin v. Hindmarsh [1891], 2 Q. B. 181, 57 J.

Where a defendant bought lard which was adulterated with four percent of beef fats, and the lard when purchased was contained in a bladder on which was printed legibly "Warranted Pure Star Brand;" it was held that these words, though placed on the bladder, did not constitute a warranty.⁷ A grocer bought lard from a manufacturer under the following contract: "We have this day sold to you three tons Kilvert's pure lard for delivery to end of January." Two barrels of lard were forwarded to him under this contract accompanied by an invoice in which they were described as "Kilvert's pure bladder lard." A portion of this lard was sold to a customer, and turned out to be adulterated. The court held that the grocer was protected by the contract, saying: "The respondent contends that the contract contained a written warranty that the lard should be pure. It is true that the contract does not in terms say that the purity of the lard is warranted, but, in my judgment, it is not necessary that the word 'warranted' should be actually used. To my mind it is enough if the language of the document imports a warranty, and shows on the part of the vendor to warrant. It was, however, said on the part of the appellant that there were two cases which were opposed to that view. The first was *Rook v. Hopley*.⁸ But that case is distinguishable on two grounds. In the first place, the statement there was that the thing sold was lard simply; there was no statement of its purity. And secondly, the statement there, such as it was, was to be found in an invoice only. But the invoice was no part of the contract, and it is in the contract and in the contract alone, that the warranty which the statute requires must be sought. I decide the

P. 775, 60 L. J. M. C. 146, 65 L. T. 149, 39 W. R. 607, is not in conflict with *Farmers', etc. Dairy Co. v. Stevens*, supra; for in *Hutchin's* case the question of warranty was only incidentally referred to, and the true ground of the decision was that there was no evidence to show that the seller sold

the article in question in the same state as when he purchased it or that he had no reason to believe that it had undergone any change.

⁷ *Elder v. Smithson*, 57 J. P. 809.

⁸ L. R. 3 Ex. Div. 209, 42 J. P. 551, 47 L. J. M. C. 118, 38 L. T. 649, 26 W. R. 663.

present case upon the construction which is to be put, not upon the invoice of December 23rd, but on the contract of December 17th. The other case relied upon by the appellant was *Harris v. May*,⁹ where it was held that a written contract made on March 24th, whereby one, F, agreed to deliver to the defendant eighty-six gallons of pure milk every day for six months, did not constitute a warranty in respect of a specific can of milk delivered by F on April 12th. There, no doubt, Lord Coleridge, at the commencement of his judgment, said that in his opinion the contract relied on by the defendant was not a written warranty within the meaning of the Act. But on looking at his judgment as a whole, I think that what he really meant was that it was not such a warranty as would cover the specific milk on April 12th, in the absence of some written evidence that that specific delivery was made under the contract. In the present case there is evidence that the particular parcel of lard was delivered under the contract, the delivery having been accompanied by an invoice which describes the lard in the same terms as those contained in the contract. The invoice, however, is immaterial, not as itself containing a warranty of purity, but as ear-marking the particular parcel as having been delivered under a contract in which a written warranty of purity was contained." "The word 'pure,'" it was also said, "in the contract of December 17th, amounts to an agreement as an essential part of the contract that the lard supplied should be pure, and that is, in my opinion, a sufficient warranty of its purity within the meaning of the section."¹⁰ In another case a defendant bought vinegar in a cask which had upon it a printed label bearing the words "Vinegar warranted unadulterated—Grimble & Co., Limited. Cumberland Market, London," and the cask was delivered to her along with an invoice in which it was described as "Grimble's Vinegar." She afterwards sold it by retail in exactly the

⁹ 12 Q. B. Div. 97, 48 J. P. 261,
53 L. J. M. C. 39.

¹⁰ *Laidlaw v. Wilson* [1894], 1
Q. B. 74, 63 L. J. M. C. 37, 42 W.

R. 78, approved in *Watts v. Stevens* [1906], 2 K. B. 323, 70 J. P.
418, 75 L. J. K. B. 828, 95 L. T.
200, 4 L. G. R. 821.

same state as she had received it from the manufacturers, and it proved to have been adulterated. It was held that she was entitled to protection under this section of the statute.¹¹ A grocer sold ground ginger adulterated with 90 percent of exhausted or spent ginger. He had purchased it as "ground ginger" in canisters, and had no reason to believe it otherwise than genuine, either when he purchased or retailed. He had received from his vendor an invoice in which it was described as "ground ginger," and each canister bore a printed label, "Warranted genuine pure ginger." It was held that neither the invoice nor the label, together or separately, constituted a written warranty, so as to entitle the grocer to the protection offered by the statute. Justice Cone reviewed two cases, and said: "Laidlaw v. Wilson¹² was referred to in the argument as being in appellant's favor, but when the judgments are read, it is plain that it governs the present case adversely to this contention. Then there was a written contract for the delivery of pure lard, and it was held that if the document relied on amounted to a warranty, it was sufficient without the word 'warrant' or 'warranty' being expressly stated in the document. . . . Here there was no such written contract, and the justices have declined to look at the invoice as throwing light on the question of warranty, and they are perfectly right. Of course, there are some cases in which an invoice or label may be regarded in this way, as in *Farmers' etc. Dairy Co. v. Stevenson*.¹³ . . . But there was a contract warranting the delivery of pure milk for a fixed period . . . it was not the label which contained the warranty; all it did was to identify the milk. When there is a written warranty in the first instance, then a label such as appears on these canisters of ginger may be regarded, but not otherwise." "There must be some express individual representation in writing from the seller to the retail dealer," said Justice Wright, "forming part of the contract to sell. . . . The representation . . . must

¹¹ *Lindsay v. Rook*, 58 J. P. 735,
63 L. J. M. C. 231.

¹² 55 J. P. 407, 60 L. J. M. C.
70, 63 L. T. 776, 17 Cox C. C. 201.

¹³ [1894] 1 Q. B. 74, 63 L. J.
M. C. 37, 42 W. R. 78.

bear essential terms in the bargain."¹⁴ A grocer bought butter from a wholesale merchant. At the time of the sale an invoice was handed to him by the merchant, in which the butter was described as "butter guaranteed pure average quality," and initialed by him. The butter turned out to be adulterated. The justices hearing the case held that the invoice constituted a sufficient warranty to satisfy the statute, and the High Court held that their finding was justified, Lord Russell saying: "An invoice is often used as evidence of the sale itself. Therefore, I see no reason why it should not be evidence of a warranty at the time of sale. Here the natural conclusion from the fact that the invoice bears the date of the day of purchase, and contains the words 'guaranteed pure,' followed by initials, is that the vendor was giving that document as a written warranty in pursuance of a stipulation by the purchaser for that object."¹⁵ A farmer entered into a written contract on January 20, 1889, to sell the defendant 1,000 gallons of milk weekly, "the milk to be pure milk." On December 15th, 1899, one of the consignments of milk was found to be adulterated. There was nothing in writing to show that the warranty attached to this particular consignment. The court held that the defendant was not protected by the warranty unless he could produce evidence in writing to show that the particular consignment was purchased under the warranty.¹⁶ A defendant in January, 1897, entered into a verbal contract with a firm of

¹⁴ *Iorns v. Van Tromp*, 59 J. P. 246, 64 L. J. M. C. 171, 72 L. T. 448, 18 Cox C. C. 132.

¹⁵ *Hawkins v. Williams*, 59 J. P. 533. The point to be noted in this case is that the invoice was dated on the day of sale, and in fact contained the terms of the contract. The conclusion to be drawn from it is that an invoice may constitute a sufficient warranty if it may be regarded as the actual contract of sale, but not otherwise. See *Lewis v. Weatheritt*, 73 J. P. 164, 100

L. T. 367, 25 T. L. R. 226, 7 L. G. R. 502.

¹⁶ *Robertson v. Harris* [1900], 2 Q. B. 117, 64 J. P. 565, 69 L. J. Q. B. 526, 82 L. T. 536, 48 W. R. 571, 19 Cox C. C. 495. This case followed *Harris v. May*, 12 Q. B. Div. 97, 48 J. P. 261, 53 L. J. M. C. 39. It was approved in *Watts v. Stevens* [1906], 2 K. B. 323, 70 J. P. 418, 75 L. J. K. B. 828, 95 L. T. 200, 4 L. G. R. 821, disapproved in the next case cited.

dairymen for a daily supply of milk. In July, 1899, the firm, at the defendant's request, gave him the following warranty in writing: "We hereby warrant that each and every supply of milk sent by us to you shall be new milk, unadulterated, and with all its cream." In July, 1900, a consignment of milk proved to be deficient in fat, but there was nothing in writing to show that the warranty applied to that particular consignment. It was held that the defendant was entitled to prove by oral evidence that the particular consignment was purchased under the warranty; that it was not necessary to show on the face of the warranty that it applied to the particular milk sold, but that the connection between the two might be shown by evidence; and that a specific warranty with each delivery of milk was not required.¹⁷ Defendants entered into a verbal contract with a farmer for the purchase of a daily supply of milk, and for a written warranty to be given with each churn. The churns were accordingly labeled "Warranted pure." One of the churns turned out to be adulterated. It was held that the defendants were protected by the warranty on the churns.¹⁸ Defendant was prosecuted for selling milk containing seven percent of added water, and he relied upon a

¹⁷ *Elliott v. Pilcher* [1901], 2 K. B. 817, 65 J. P. 743, 20 L. J. K. B. 795, 85 L. T. 50, 20 Cox C. C. 18. The court considered that *Harris v. May*, *supra*, and *Laidlaw v. Wilson*, *supra*, were irreconcilable, and it followed the latter case, and declined to follow *Harris v. May* and *Robertson v. Harris*, *supra*. But in *Watts v. Stevens* [1906], 2 K. B. 323, 70 J. P. 418, 75 L. J. K. B. 828, 95 L. T. 200, 4 L. G. R. 821, the majority of the court held that *Elliott v. Pilcher* was wrong.

¹⁸ *Bacon v. Callow Park Dairy Co.*, 66 J. P. 804, 87 L. T. 70, 18 T. L. R. 573.

Lord Alverston, C. J., said he doubted whether, having regard to the more recent case, *Harris v. May* could be regarded as law. It should be observed that this case differs from *Elder v. Smithson*, 57 J. P. 809, and *Iorns v. Van Tromp*, 59 J. P. 246, 64 L. J. M. C. 171, 72 L. T. 449, 18 Cox C. C. 132, in which a label was held not to be sufficient warranty in itself, inasmuch as here there was a contract to give a warranty by the label, and therefore there was a consideration for the warranty so given. See *Lewis v. Weatheritt*, 73 J. P. 164, 100 L. T. 367, 25 T. L. R. 226, 7 L. G. R. 502.

document as containing a warranty. It was in these terms: "I, A. Playle, agree to buy and Messrs. F and P agree to sell, but without accepting responsibility after delivery, about fifty-four Imperial gallons of pure milk every day up to March 31, 1903." The milk was found to be adulterated after it had been delivered. The magistrate was of the opinion that the document was a valid warranty, and afforded a defense, notwithstanding the words of limitation contained in it; and his decision was held to be right.¹⁹ A milkman made a verbal contract with a farmer for a periodical supply of milk in or about August, 1905. On August 5, 1905, after the making of the contract but before the delivery of any milk thereunder, the farmer gave him the following written guaranty: "I guarantee that the milk supplied by me to Mr. Stevens is perfectly pure and with all its cream as the cow gives it." On December 28, 1905, a consignment of milk turned out to be adulterated. The justices found as a fact that the parties intended the written warranty to cover that consignment, but there was nothing in writing to connect them. The court held that a warranty may be good although it relates to goods not then in existence, but it was further held that in the absence of any written evidence to connect the particular consignment with the warranty, the latter afforded no defense.²⁰ By a contract in writing, dated October 22, 1905, the appellant agreed to purchase from the Great Western and Metropolitan Dairies, Limited, the whole of the milk required for his dairy for twelve months. The contract contained the following clause: "All milk to be delivered by the vendors at the purchaser's address in a

¹⁹ *Wilson v. Playle*, 67 J. P. 263, 1 L. G. R. 870.

²⁰ *Watts v. Stevens* [1906], 2 K. B. 323, 70 J. P. 418, 75 L. J. K. B. 828, 95 L. T. 200, 4 L. G. R. 821. The court reviewed all the earlier cases on the point, approved *Harris v. May*, 12 Q. B. Div. 97, 48 J. P. 261, 53 L. J. M. C. 39; *Laidlaw v. Wilson* [1894], 1 Q.

B. 74, 63 L. J. M. C. 37, 42 W. R. 78, and *Robertson v. Harris* [1900], 2 Q. B. 117, 64 J. P. 565, 69 L. J. Q. B. 526, 82 L. T. 536, 48 W. R. 571, 19 Cox C. C. 495, and stated in its opinion that *Elliot v. Pilcher* [1901], 2 K. B. 817, 65 J. P. 743, 70 L. J. K. B. 795, 85 L. T. 50, 20 Cox C. C. 18, was wrong.

sweet, pure and salable condition, all warranted by them pure with all its cream as received from the cow, but no responsibility will be taken by the vendors after delivery." On June 27, 1906, a consignment under the contract was delivered, accompanied by a delivery note addressed to the appellant and commencing: "Please receive from the Great Western and Metropolitan Dairies, Limited," but containing no reference to the contract. It was held that the appellant was entitled to rely upon the warranty. Chief Justice Alverstone said: "It is not suggested that the appellant received milk from any one but the Great Western and Metropolitan Dairies; he proved the receipt of this particular consignment from that company, and he produced the contract of October 22, 1905, which showed that all his milk came from the company's dairy. In my judgment that document (i. e., the contract of October 22nd) is in these circumstances sufficient on its face to show the requisite written connection between this consignment of milk and the warranty contained in the contract."²¹ One Bainbridge sold milk to one Edwards under a warranty. Edwards resold part to the appellant under a written warranty that it was "in the same condition as when received and as warranted by Bainbridge, viz., pure new unskimmed milk." It was the practice for the appellant to go to the station and there take possession of some of the churns consigned by Bainbridge to Edwards. Each churn bore a label "Warranted pure new and unskimmed milk: G. H. Bainbridge." The magistrate thought that there was not sufficient evidence in writing to connect the warranty with each particular churn, but the High Court held that there was.²² The appellant had a written contract containing a warranty with one Carter for a daily supply of milk till March 31, 1908. Each churn had a

²¹ *Evans v. Weatheritt* [1907], 2 K. B. 80, 71 J. P. 228, 76 L. J. K. B. 628, 96 L. T. 641, 23 T. L. R. 424, 21 Cox C. C. 415, 5 L. G. R. 608.

²² *Rees v. Davis*, 72 J. P. 375,

24 T. L. R. 735, 6 L. G. R. 1038. Lord Alverstone intimated that a warranty on a churn label might perhaps be sufficient if it contained the names of the sender and receiver.

label: "To Mr. Lewis, 1 churn, 17 gallons, pure new milk from Carter's Creamery." After March 31, 1908, there were negotiations as to the amount to be supplied in the future, but no new contract was ever entered into, and the old amount was supplied daily with the old label. The High Court held that the appellant was protected, and that after the end of the old contract there was a daily sale and on each sale a written warranty.²³ To succeed in the defense of warranty the person relying upon it must have received it from his immediate vendor; although one of the judges has intimated that if upon a resale the benefit of a warranty be assigned in writing to the purchaser he may be able to avail himself of it.²⁴ Under the statute quoted at the beginning of this section it should be noted that to enable the vendor to avail himself of the warranty, he must prove that he "purchased the article as the same in nature, substance and quality as that demanded of him by the prosecutor, . . . and that he had no reason to believe at the time when he sold it that the article was otherwise, and that he sold it in the same state as when he purchased it."²⁵ Thus where a milk dealer who had bought milk with a warranty added boric acid to it before reselling it, the court held that he could not rely upon the warranty as a defense, although the boric acid was not relied upon as an adulteration.²⁶ Where a dairyman bought milk with a warranty under a contract for delivery at a railway station, and a consignment of milk arrived at the station at 4:20 a. m., but was not removed till after 5 a. m., and the dairyman proved that the milk was in the same state as when he removed it, but he could not prove in what state it was when it arrived, it was held that

²³ *Lewis v. Weatheritt*, 73 J. P. 164, 100 L. T. 367, 25 T. L. R. 226, 7 L. G. R. 502. It is clear that the court considered the label on the churn a sufficient warranty.

²⁴ *Hargraves v. Spackman*, 72 J. P. 52, 98 L. T. 41, 24 T. L. R. 173, 21 Cox C. C. 541, 6 L. G. R. 145.

²⁵ *Hotchin v. Hindmarsh* [1891], 2 Q. B. 181, 57 J. P. 775, 60 L. J. M. C. 146, 65 L. T. 149, 39 W. R. 607; *Jones v. Bertram*, 58 J. P. 116.

²⁶ *Hennen v. Long*, 68 J. P. 237, 90 L. T. 387, 20 Cox C. C. 608.

the purchase was completed at the time of the removal and not at the time of the arrival, and that, therefore, the dairyman could rely on the warranty.²⁷ A servant or agent who has obtained a warranty is not protected by a warranty given his master or principal, in cases where such servant or agent is prosecuted as seller.²⁸ A subsequent statute²⁹ provided that a warranty or invoice should not be available as a defense to any proceeding under the Sale of Food and Drugs Acts³⁰ unless the defendant, within seven days after service of the summons, sent to the purchaser a copy of such warranty or invoice with a written notice that he intends to rely on the warranty or invoice." But under the decisions the actual words of the warranty need not be set out, if its terms are distinctly stated. Thus where the defendants entered into a contract for a periodical supply of milk to them by a farmer with a warranty of its purity, the contract of warranty being contained in a number of letters between the parties, and each can of milk was labeled "warranted pure;" and on being prosecuted the defendants gave notice that they relied upon a warranty, and sent a copy of the label on the cans, but did not disclose the correspondence, it was held that there was a sufficient compliance with this statute just quoted, the court saying that "A copy of the correspondence would not be half as useful as a copy of the terms of the warranty."³¹ A purchaser bought butter under a verbal contract that a written warranty should be given and put upon the invoice. The invoice arrived on the same day, and contained the words, "We guarantee all butter sold by us to be absolutely pure." The purchaser was not satisfied with this, so a week later, after the delivery of the butter, he induced the seller to add the words, "Guar-

²⁷ *Sanders v. Sadler*, 71 J. P. 3, 95 L. T. 872, 5 L. G. R. 240.

²⁸ *Hotchin v. Hindmarsh* [1891], 2 Q. B. 181, 57 J. P. 775, 60 L. J. M. C. 146, 65 L. T. 149, 39 W. R. 607. This has been changed in England by statute. 62 and 63 Vict., ch. 51, § 20. On this section

20, see *Manners v. Tyler* [1902], 1 K. B. 901, 71 L. J. K. B. 585, 86 L. T. 716, 50 W. R. 604.

²⁹ 62 and 67 Vict., ch. 51, § 20.

³⁰ 38 and 39 Vict., ch. 63.

³¹ *Irving v. Callow Park Dairy Co.*, 66 J. P. 804, 87 L. T. 70.

anted pure butter in accordance with the third and seventh sections of the Margarine Act, 1887." The butter was adulterated and he was prosecuted. His solicitors then wrote to the prosecutor giving notice of warranty, and said: "The following is a copy of the warranty," setting out the two sentences above mentioned. The court held that under all the circumstances of the case the notice was sufficient, saying: "I think section 20, which requires a copy of the warranty to be delivered to the complainant, did not mean to say that under all circumstances the warranty must be correctly set out where there is room for contention as to what the warranty actually was."³² A statute of the State of Missouri³³ provides that no dealer shall be prosecuted under its provisions when he can establish a guaranty as provided by the National Food and Drugs Act of June 30, 1906, or a guaranty signed by a wholesaler, jobber or manufacturer either residing within the State or who shall have complied with the requirements for service of process in proceedings under the Act, to the effect that the products are not adulterated or misbranded in the original unbroken packages. It was held that this did not militate against the liability, under the act of dealers in food and dairy products, for placing therein substances which are "poisonous or injurious to health in any quantity for any purpose whatsoever;" the meaning of the statute being merely to relieve the dealer of the necessity of analyzing each and every unbroken package sold or consigned to him, and to authorize him to sell from such packages, under the guaranty mentioned thereon, providing the wholesaler, jobber, or manufacturer has complied with the provisions of the statute.³⁴ A vendor of milk had been supplied with milk by a farmer for years. In September, 1908, the farmer gave the vendor the following signed letter: "I hereby guarantee and warrant that all milk supplied by me to you is of the nature, quality and substance demanded by law. And I give this warranty for the pur-

³² *Farthing v. Parkinson*, 68 J. P. 353, 90 L. T. 783, 20 Cox C. C. 661, 2 L. G. R. 989.

³³ Acts 1907, p. 242, § 12.

³⁴ *St. Louis v. Wortman*, 213 Mo. 131, 112 S. W. 520.

poses of the sale of the Food and Drugs Act, 1899." It was held that this warranty applied to all future deliveries of milk, and that the vendor was entitled to the protection a vendor was given by the statute in reselling an adulterated article when he had purchased it under a warranty that it was unadulterated and pure.³⁵ A farmer supplying milk gave a warranty: 'I hereby guarantee and warrant that all milk supplied by me to you is of the nature, quality and substance demanded by law. And I give this warranty for the purposes of the Sale of Food and Drugs Act, 1899.' It was held to be a continuing warranty and protected the reseller.³⁶

§ 572. Sales by Agent.

One who sells adulterated food by an agent violates the statute prohibiting the sale of such food just as much as if he in person made the sale.¹ It is always a question whether the person making the sale had authority from the defendant to make it; and that authority must be shown before the defendant can be found guilty. Like any other question of agency it may be proven either by direct or circumstantial evidence. Thus upon a charge of a defendant having in his possession adulterated milk with intent to sell it, and it is shown that his servant had possession of it, it must be shown that such servant was acting for and in accordance with the

³⁵ *Draper v. Newnham*, 102 L. T. 280, 74 J. P. 124, 8 L. G. R. 144.

A warranty to supply "milk" does not require the furnishing of "pure" milk. *Ford v. Urquhart*, 21 Vict. L. R. 688, 17 Aust. L. T. 297, 2 Aust. L. R. 110.

³⁶ *Draper v. Newnham*, 102 L. T. 280, 74 J. P. 124, 8 L. G. R. 144.

¹ *Newton v. Reed*, 10 N. J. Law Jour. 175; *Harvey v. Newton*, 52 N. J. L. 369, 19 Atl. 793; *Verona Central Cheese Co. v. Murtaugh*, 50 N. Y. 314; *State v. Smith*, 10 R. I. 258; *Hunter v. State*, 1 Head 160,

73 Am. Dec. 164; *Commonwealth v. Gray*, 150 Mass. 327, 23 N. E. 47; *Heider v. State*, 4 Ohio S. & C. P. Dec. 227; *Meyer v. State* (Ohio St.), 43 N. E. 164 (principal to be tried in county where sale takes place); *People v. Terwilliger*, 59 N. Y. Misc. 617, 110 N. Y. Supp. 1034; *Williams v. State*, 25 Ohio Cir. Ct. Rep. 673; *Myer v. State*, 10 Ohio Cir. Ct. Rep. 226; *Diersing v. State*, 29 Ohio Cir. Ct. Rep. 469; *Houghton v. Mundy*, 103 L. T. 60, 74 J. P. 377, 8 L. G. R. 838.

will of his master, the defendant.² Where a clerk in his principal's store makes a sale of adulterated food or oleomargarine, apparently in the ordinary course of business, proof of that fact is *prima facie* evidence of a sale by such principal.³ If the sale was unauthorized, yet closed in the ordinary course of business, the principal will nevertheless be liable for it personally. Thus the Supreme Court of Indiana has said in a recent case: "The sale of oleomargarine in an adulterated form, or as a substitute for butter, is a crime against the public health. Whoever, therefore, engages in its sale, or in the sale of any article interdicted by the law, does so at his peril, and impliedly undertakes to conduct it with whatever degree of care is necessary to secure compliance with the law. He may conduct the business himself, or by clerks or agents, but if he chooses the latter the duty is imposed upon him to see to it that those selected by him to sell the article to the public obey the law in the matter of selling; otherwise, he, as the principal and responsible proprietor of the business, is liable for the penalty imposed by statute. We do not believe that it was the legislative intent that such proprietor should escape by showing that an unlawful sale made by his clerk was unauthorized. We must take a practical, common-sense view of the whole statute, to give effect to the legislative purpose. To hold that the proprietor should be held liable only when the sale was made in his presence, or with his knowledge or consent, would be to prepare a way of easy escape. When we take into consideration the community of interest of the proprietor and clerk, in a case like this, and that private instructions to a clerk may be given in such a way that there may be more meaning in the manner than in the words spoken, and adding thereto the fact that the modern method of ordering supplies by telephone renders the identification of the seller generally impossible, we are led to the conclu-

² *State v. Smith*, 10 R. I. 258; 335, 38 S. W. 317; *Hunter v. State, Commonwealth v. Hough*, 1 Pa. 1 Head (Tenn.) 160, 73 Am. Dec. 164; *Newton v. Reed*, 10 N. J. Law Dist. Rep. 51.

³ *State v. Bockstruck*, 136 Mo. Jour. 175.

sion that to sustain appellant's contention would operate as a virtual overthrow of the statute." After making several quotations, the court concludes with this language: "While the adjudications are not in harmony, as indicated by the text quoted, we think the better reason and weight of authority are to the effect that when the element of guilty knowledge and intent is eliminated from an offense, and the doing of the act by any person is interdicted, the principal shall be held to answer for the delinquency of his agent while the latter is engaged in performing the usual duties of the agency."⁴ In a nisi prius Ohio case it was said: "To hold that by private instructions to a clerk a person in the oleomargarine business might escape prosecution or punishment, would go a long way, it seems to us, toward destroying the beneficial effects and purposes of this law. In many cases such goods are ordered by telephone, and the clerk is not seen; there is no way of identifying him. . . . Where the article is sold by his authority, it is not like a case where a party has prohibited his clerks from selling the article at all, or where the clerk without any authority has sold the article, or where some one has come into his store without authority and sold the article. But here is a case where the party is engaged in the business of selling, where he intends to sell it, and where his clerks are authorized and employed to sell it."⁵ In the Indiana case from which a quotation has been made, the facts were these, as stated by the court: "Appellant is the proprietor of a stall in the Indianapolis market house. Among other food products, he keeps for sale oleomargarine and creamery butter, but not dairy butter. April, 1907, one Bruner, an inspector in the employ of the State Board of Health, presented himself at appellant's stall and asked for one pound of dairy butter. Appellant was not present. The stall was in the sole charge of a young woman, a clerk and employe of appellant, who answered

⁴ *Groff v. State*, 171 Ind. 547, Rep. 673; affirmed 69 Ohio St. 570, 85 N. E. 769.

⁵ *Williams v. State*, 4 Ohio C. dy, 103 L. T. 60, 74 J. P. 377, 8 Ct. (N. S.) 13, 25 Ohio Cir. Ct. L. G. R. 838.

Bruner's application by taking from under the counter a package which she wrapped and handed to Bruner, and for which she charged and received twenty-five cents. The package was wrapped in a paper that had stamped upon it in large letters the word 'oleomargarine,' but which was not observed by Mr. Bruner until the day of trial of this cause. Appellant had previously given instructions to the young lady clerk to sell everything in the stall for just what it was, and to sell nothing as a substitute for something else. These facts," the court proceeded to say, "show that the sale was made by a clerk who was employed by appellant to sell oleomargarine from the particular stall, along with butter and other things. The sale was in the regular course of business, in the exercise of the usual duties of her employment, made for appellant, upon his apparent authority and for his benefit; and it seems clear that he should be answerable if he had failed to apply the necessary precautions in selecting, counseling and oversight of his agent; or, in other words, held responsible for what he had done by another."⁶ A sale of a glass of adulterated milk in a restaurant by a waiter renders the waiter's employer liable.⁷ It is not necessary, unless a statute expressly requires it, to aver that the sale was by an agent, in order to convict the principal.⁸ The general manager of a corporation engaged in selling food supplies at wholesale, who, in the course of such business, keeps in stock and sells, through traveling salesmen, an adulterated article of food, may be prosecuted, under a statute prohibiting the sale of impure and adulterated articles; and the place of the sale is the county in which the prosecution must be brought.⁹ Where a statute made it an offense to knowingly sell or bring to any cheese factory,

⁶ *Groff v. State*, 171 Ind. 547, 85 N. E. 769. The court refused to extend the adjudications in instances of sales of intoxicating liquor by barkeepers and servants to an instance of a sale of adulterated food.

⁷ *Commonwealth v. Vieth*, 155 Mass. 442, 29 N. E. 577.

⁸ *Commonwealth v. Haynes*, 107 Mass. 194.

⁹ *Bissman v. State*, 9 Ohio Cir. Ct. Rep. 714; *Meyer v. State* (Ohio St.), 43 N. E. 164.

diluted, adulterated or skimmed milk, it was held that express authority from the owner to his servant to dilute, adulterate, or depreciate the quality of the milk in any particular manner was not necessary to constitute the offense, but it was sufficient to prove knowledge by the defendant that his servants or agents did deliver bad milk, on authority by them to do so.¹⁰ Where the owner is liable even though he did not know the milk was adulterated, upon a charge of a sale, it is proper to charge the jury that the defendant was guilty if he sold adulterated milk by his servant, in the ordinary course of business, even if he did not know it was not of standard quality, if there be no suggestion that the servant violated his orders.¹¹ Possession of a servant is the possession of the master, in a prosecution for having in his possession adulterated milk or food with intent to sell it.¹² So one selling milk at retail from house to house may bind his employer by representations to customers concerning the quality of the milk furnished; for such representations are within the apparent scope of his authority; but representations made by him to the State's inspectors are not binding on the principal.¹³ A grocer wrapped one

¹⁰ *Verona Central Cheese Co. v. Murtaugh*, 50 N. Y. 314.

¹¹ *Commonwealth v. Vieth*, 155 Mass. 442, 29 N. E. 577.

Where the officer making an analysis of milk had to notify the owner of the milk or his agent, it was held that where the milk went up to London by train, a railway porter at the terminus at which the milk arrived was not the agent of the seller for the purpose of receiving the notification. *Rouch v. Hall*, 6 Q. B. Div. 17, 45 J. P. 220, 50 L. J. M. C. 6, 29 W. R. 304.

¹² *Commonwealth v. Proctor*, 165 Mass. 38, 42 N. E. 335.

¹³ *People v. Terwilliger*, 59 N. Y. Misc. 617, 110 N. Y. Supp. 1034. The admitted sale of milk which

was below standard from a wagon belonging to the defendant, and from cans which contained the supply he had delivered to his customers, does not justify his conviction of selling milk below standard, where the evidence fails entirely to show that the boy who made the sale was authorized to sell milk, or had ever sold any before, but that he sold the milk on this occasion without the knowledge of the owner, while temporarily in charge of the wagon, and did not account to the owner for the money received therefore. *Diersing v. State*, 29 Ohio Cir. Ct. Rep. 469.

Where the wife of a liquor dealer broke a bottle containing liquor when an inspector demanded a sam-

pound of oleomargarine for his own use, and laid it on the counter and went away. A customer came in and asked for one pound of salt butter. The clerk saw this package, did not know what it was for, but sold it to the customer. He had been told to sell butter only from bulk and not by the package. It was held that the grocer had violated the statute.¹⁴

§ 573. Liability of Agent.

An occasional statute can be found which makes it an offense for an agent to solicit orders for the purchase of adulterated food. And some of those statutes declare that the taking of an order for future delivery of an article "shall be deemed a sale" within their provisions. But if an agent solicits an order for pure food, and his principal fills it with an adulterated article, then such agent is not liable, for such a sale is a sale of pure food as to such agent, though a sale of impure food as to his principal.¹ And where the agent of a wholesale house solicited an order for oleomargarine, and his principal, without his knowledge, shipped oleomargarine colored in imitation of pure butter in the name of the purchaser, but in care of the agent, it was held that the agent can not be convicted for selling oleomargarine colored in imitation of butter, for he has no right to open the package nor opportunity to inspect it; and he was justified in assuming that his principal had shipped the goods ordered, and not an adulterated article.² But an agent who knowingly, at least, sells adulterated food violates the pure food statutes.³

ple of the liquor, so that none could be secured by him, it was held that the liquor dealer was not liable for her act. *Taylor v. Nixon* [1910], 2 Ir. Rep. 94.

¹⁴ *Houghton v. Mundy*, 103 L. T. 607, 74 J. P. 377, 8 L. G. R. 838.

¹ *People v. Morse*, 131 Mich. 68, 90 N. W. 673, 9 Detroit Leg. N. 198; *People v. Skillman*, 129 Mich. 618, 89 N. W. 330, 8 Detroit Leg.

N. 1090 (distinguishing *People v. Snowberger*, 113 Mich. 86, 71 N. W. 497, 67 Am. St. 449, and *People v. Grocer Co.*, 118 Mich. 604, 77 N. W. 315).

² *Commonwealth v. Richards*, 16 Montg. Co. Law Rep. 176.

³ *Meyer v. State* (Ohio St.) 43 N. E. 164; *Myer v. State*, 10 Ohio Cir. Ct. Rep. 226; *State v. Walsh*, (Wis.), 129 N. W. 656.

§ 574. When Sale must be by Agent to Make Principal Liable.

Occasionally the sale must be by an agent to make the principal liable by reason of a peculiar phraseology of the statute. Such was held to be the case where a statute provided "that no person, either by his servant or agent, or as the servant or agent of another person," should have in his custody or possession, with intent to sell, impure milk. It was held to apply only to agents and servants and not to the principals themselves. "Manifestly it is only a sale," said the court, "exchange, delivery, custody or possession by or through a servant or agent or in the capacity of servant or agent for another, that is forbidden in this Act."¹

§ 575. Knowledge Measure is too Small.

Where an ordinance required all persons of a class who sold milk in bottles or glass jars within the city to sell it in bottles or glass jars of a certain capacity, it was held no defense that the dealer did not know that his bottles did not meet the requirements of the ordinance.¹

¹ State v. Squibb, 170 Ind. 488, 234 Ill. 294, 84 N. E. 913, 123 Am. 84 N. E. 969. St. 100.

¹ Chicago v. Bowman Dairy Co.,

CHAPTER XV.

STATE CONTROL OF OLEOMARGARINE.

SEC.

576. Definitions.

577. Imitation of butter.

578. Natural color—Imitation of butter.

579. Pure butter of low grade.

580. Pure butter below grade.

581. Coloring butter no offense.

582. Non-imitation of butter—Imitation.

583. Liability of hotel, restaurant or boarding house.

SEC.

584. Sale of oleomargarine in unlicensed restaurant.

585. Disclosing article sold is oleomargarine.

586. Oleomargarine under fancy name.

587. Sale in sealed packages.

588. Sign that oleomargarine is used in restaurant.

§ 576. Definitions.

In England "oleomargarine" is called "margarine." The statutes of the several States sometimes define the word "oleomargarine," and in other instances they give a description of a substance which they may or may not call oleomargarine, and forbid its sale as a butter. An English statute defines "margarine" as meaning "all substances whether compounds or otherwise, prepared in imitation of butter, and whether mixed with butter or not;" and it defined "butter" as "the substance usually known as butter, made exclusively from milk or cream, or both, with or without salt or other preservative, and with or without the addition of coloring matter."¹ When this definition of margarine was in force a purchaser asked for margarine, and obtained margarine which contained 21 percent of water. The analyst certified that this was at least 5 percent more water than margarine should contain. The seller argued that by this definition the word "margarine" meant all substances pre-

¹ 50 and 51 Vict., ch. 29, § 3.

pared in imitation of butter, and that this substance was an imitation of butter, and was therefore margarine. But the court held that the substance sold was not margarine, but margarine and water; and that the seller had violated a statute which provided that "No person shall sell to the prejudice of the purchasers any article of food which is not of the nature, substance and quality of the article demanded by such purchaser."² In a subsequent case the same court held that a mixture of butter and milk, called "Peark's Butter" was not margarine within the definition quoted above, and therefore could be sold, although containing more than 10 percent of butter fat.³ "Nut cream butter," an article prepared in imitation of butter, but containing no animal fat, and unknown at the time of the adoption of the above definition, is "margarine" within such definition.⁴

§ 577. Imitation of Butter.

Where a statute makes it an offense to sell or offer for sale any article of food which is an imitation of or sold under the name of another article, the sale of an article which is an imitation is a violation of the Act, though the article itself is neither adulterated nor deleterious to health.¹

² *Burton v. Mattison*, 66 J. P. 628, 86 L. T. 770; *Roberts v. Leeming*, 69 J. P. 417, 3 L. G. R. 1031.

³ *Bayley v. Pearks, Gunston and Tea, Limited*, 66 J. P. 790, 87 L. T. 67.

⁴ *Wilkinson v. Alton*, 72 J. P. 252, 99 L. T. 119, 6 L. G. R. 544.

In the examination of these cases it must be borne in mind that it is made an offense to sell margarine which contains more than sixteen percent of water. 7 Edw. 7, ch. 21, § 4.

The English statute now in force defines "margarine" as meaning "any article of food whether mixed with butter or not, which resem-

bles butter and is not a milk-blended butter." 7 Edw. 7, ch. 21, § 13.

What plea in defense must state where it is alleged the oleomargarine sold was manufactured outside the State. *Rouch v. State*, 89 Md. 755, 43 Atl. 934.

¹ *Commonwealth v. Kolb*, 13 Pa. Super. Ct. 347; *Waterbury v. Newton*, 50 N. J. L. 534, 14 Atl. 604; *Bayless v. Newton*, 50 N. J. L. 549, 18 Atl. 77.

Under the New York law of 1885, ch. 183, § 7, forbidding the manufacture or sale of products not made from unadulterated milk, in imitation or semblance, or designed to take the place of butter,

§ 578. Natural Color—Imitation of Butter.

A statute which makes it an offense to manufacture or sell any product made wholly or in part of any fat not produced from adulterated milk or cream, which shall be in imitation of yellow butter, but providing that it shall not be construed to prohibit the manufacture or sale of oleomargarine free from coloration or ingredient that causes it to look like butter, does not prevent the manufacture or sale of an article, the ingredients of which themselves naturally produce the yellow color, and thereby resemble yellow butter.¹

§ 579. Pure Butter of Low Grade.

A statute defining oleomargarine as any substance, not pure butter, of not less than 80 percent of butter fat, which substance is made as a substitute for butter, does not include butter made from pure milk without any adulteration,

it is sufficient to constitute the offense that coloring matter is present, making the oleomargarine sold resemble butter; such coloring matter not being essential or necessarily incident to its manufacture, and the only object being to make the oleomargarine resemble dairy butter, and so increase its value. *People v. Arensberg*, 105 N. Y. 123, 11 N. E. 277, 59 Am. Rep. 483. Consequently it was held that an instruction to the jury that if they believed the defendant sold an article called "oleomargarine," and that it was not a production of pure, unadulterated milk or cream, he was guilty, was erroneous in not submitting to them the question whether the article was or was not an imitation of butter. *Ibid*.

¹ *Bennett v. Carr*, 134 Mich. 243, 96 N. W. 26, 10 Detroit Leg. N. 407; *People v. Schintzins*, 61 N. Y.

Misc. 410, 113 N. Y. Supp. 313; *People v. Arensberg*, 105 N. Y. 123, 11 N. E. 277, 59 Am. Rep. 483.

The Pennsylvania statute of May 29, 1901 (P. L. 277), does prevent the sale of yellow oleomargarine, though the resemblance to yellow butter is produced by the admixture of the component parts of the article. *Commonwealth v. Mellet*, 27 Pa. Super. Ct. 41; *Commonwealth v. Vandyke*, 13 Pa. Super. Ct. 484; *Commonwealth v. Caulfield*, 27 Pa. Super. Ct. 279.

The New York statute prohibiting the coloring of oleomargarine to resemble butter, is aimed at an intentional imitation of dairy butter, and not at common qualities inherent in the article. *People v. Simpson, Crawford Co.*, 62 N. Y. Misc. 240, 114 N. Y. Supp. 945; affirmed 142 N. Y. App. —, 126 N. Y. Supp. 1141.

though it may be deficient in butter fats, where such statute does not purport to regulate the sale or grade of butter.¹

§ 580. Pure Butter Below Grade.

A statute providing that the word "oleomargarine" shall mean any substance, not pure butter, of not less than 80 percent of butter fats, which substance is made as a substitute for butter, does not apply to admittedly pure butter, although it contains less than 80 percent of butter fats.¹

§ 581. Coloring Butter no Offense.

A statute which prohibits the manufacture and sale of oleomargarine in imitation of butter has no application to the manufacture of butter; and therefore it is no offense to color butter in order to make it yellow.¹

§ 582. Non-imitation of Butter—Imitation.

A statute which prohibits the manufacture and sale of oleomargarine made in imitation of butter, but providing that nothing in the Act shall be construed to prohibit the manufacture and sale of oleomargarine in a distinct form, and in such manner as will advise the consumer of its real character, free from coloration or ingredient that cause it to look like butter, does not apply to oleomargarine not made in imitation of butter, for the statute is directed solely to products in imitation of yellow butter.¹ To constitute a violation of the statute, the article must be so colored as to imitate natural butter.² When the offense is a sale of a product made in imitation of butter, it is error for the court to tell the jury the offense was committed if the defendant sold an article not the production of pure unadulterated milk or

¹ State v. Ransick, 62 Ohio St. 283, 56 N. E. 1024.

¹ Ransick v. State, 15 Ohio Cir. Ct. Rep. 371, 8 Ohio Dec. 306.

¹ Commonwealth v. Vandyke, 13 Pa. Super. Ct. 484.

¹ Commonwealth v. Huntley, 156 Mass. 236, 30 N. E. 1127, 15 L. R. A. 839.

² People v. Arensberg, 40 Hun 358.

cream, in the absence of instructions submitting the question whether the article was or was not an imitation or semblance of butter.³ The phrase "yellow butter" used in a statute making it an offense to sell or offer for sale oleomargarine colored in imitation of "yellow butter" made from pure milk or cream, means any butter produced from pure milk or cream having a "perceptible shade" of yellow.⁴ Where a statute makes it an offense to manufacture and sell oleomargarine that is an imitation or semblance of natural butter, the imitation or semblance must be proven before there can be a conviction.⁵ Under such a statute, where the evidence showed a sale by the defendant of oleomargarine containing about as much artificial coloring as was used in butter, and in close imitation thereof; and there was evidence that most butter contained artificial coloring matter, but there was no evidence of the color of natural butter, except that some was nearly white, which would have been the case of oleomargarine, had it not been colored, it was held that the evidence was insufficient to show that the oleomargarine was manufactured as an imitation of natural butter, since the evidence showed no standard by which a comparison in color can be made.⁶ Where a statute forbids the manufacture or sale of any substitute for butter with which is combined any annatto or compound of it, or any substance or substances for the purpose or with the effect of imparting to it a yellow color, so that the substitute resembles yellow butter, it is immaterial what substance is used to give the substitute such resemblance.⁷ A statute prohibiting the manufacture of any substance not produced from milk or cream and not the product of the dairy, with intent to sell it as butter made from unadulterated milk or

³ *People v. Arensberg*, 103 N. Y. 388, 8 N. E. 736, 57 Am. Rep. 741.

⁴ *People v. Phillips*, 135 Mich. 395, 91 N. W. 616, 9 Detroit Leg. N. 393.

⁵ *People v. Meyer*, 44 N. Y. App. Div. 1, 60 N. Y. Supp. 415.

⁶ *People v. Hillman*, 58 N. Y. App. Div. 571, 69 N. Y. Supp. 66, 15 N. Y. Cr. Rep. 394.

⁷ *State v. Bockstruck*, 136 Mo. 335, 38 S. W. 317.

cream, and the sale of such substance as natural butter, does not prohibit a sale of an oleaginous substance not the product of the dairy and not made from milk or cream, unless the sale was with the intent to sell such substance as genuine natural butter.⁸

⁸ *People v. Laning*, 40 N. Y. App. Div. 227, 57 N. Y. Supp. 1057; *People v. Hale*, 62 N. Y. Misc. Rep. 240, 114 N. Y. Supp. 945; affirmed *People v. Fried*, 62 N. Y. Misc. 240, 116 N. Y. Supp. 1131; *People v. Simpson, Crawford Co.*, 133 N. Y. App. Div. 936, 118 N. Y. Supp. 1132.

Under the New York statute of Laws 1893, p. 663, ch. 338, § 26, the gist of the offense is the sale of the oleomargarine manufactured or produced "in imitation or semblance of natural butter," rather than deceit in the sale of the article. *People v. Teele*, 131 N. Y. App. 87, 115 N. Y. Supp. 212.

A statute defined oleomargarine as any article or substance in the semblance of butter not the usual product of the dairy, and not made exclusively of pure, unadulterated milk or cream, or any article or substance into which any oil, lard, or fat not produced from milk or cream, entered as a component. Another section of the same statute, as subsequently amended, provided that any person manufacturing or selling any substance in imitation or semblance of butter should be deemed guilty of a violation of the statute whether he sold such substance as butter, oleomargarine, or under any other name or designation. In a prosecution for a violation of this statute the preliminary depositions showed that the defen-

dant sold an article called "Oleomargarine," consisting of a small brick of white substance wrapped in paper, and labeled "Oleomargarine." There was no evidence that the article imitated or was in semblance of natural butter. The chemist who analyzed the substance deposed that it was not natural butter, nor of the color of natural butter produced from pure milk or cream, but was what was commonly known as oleomargarine. It was held that the depositions negatived the fact that the substance was an imitation or in semblance of natural butter, and disproved the essential facts necessary to constitute the crime. *People v. Wahle*, 124 N. Y. App. 762, 109 N. Y. Supp. 629.

Certain inspectors found on the accused's premises a tub of a substance marked "Baker's Choice." The tub was also stamped with the word "Oleomargarine," and the State chemist testified that it was other than butter and answered a description of oleomargarine, but that he had not tested it or examined its texture. The accused's evidence, which was undisputed, showed that the substance had neither the taste nor texture of butter, that it contained no poison, and was not colored. It was held that he was not guilty of a violation of a statute providing that no keeper of a bakery should keep,

§ 583. Liability of Hotel, Restaurant or Boarding House Keeper.

Statutes are frequently so broad as to prohibit a hotel, restaurant or boarding house keeper selling or furnishing his guests with oleomargarine, at least unless licensed and they comply with certain of their provisions. Thus one section (26) of a statute provided that no person should produce or manufacture any compound in imitation of natural butter, or sell any compound produced "in violation of the section whether such compound be made or produced in this State or elsewhere." A subsequent section (28) provided that no keeper of a restaurant should serve therein as food for his customers "any compound made in violation of the provisions of this article." It was held that the phrase "in violation of the provisions of this article" is used in the same sense in both sections, and that the last section prohibited the serving of the condemned compound, whether manufactured in the State or elsewhere.¹ So the serving at a public restaurant as a substitute for butter oleomargarine, which though not eaten is paid for as part of the meal, and carried away by the customer constitutes a sale of the article, and comes within the provisions of a statute prohibiting the sale of adulterated food.² Even the use of oleomargarine made in imitation of butter for cooking

use, or serve any article or substance resembling butter, as, or for butter. *People v. Gottfried* (N. Y. App.), 113 N. Y. Supp. 1086.

In an action to recover a penalty prohibiting the sale of oleomargarine "as butter," one witness, who, as inspector, examined the defendant's stock, testified that the defendant told him that he had been selling a substance, found on analysis to be oleomargarine, "for butter," and this was the only evidence that the substance was sold "as butter." It was held that the

defendant was entitled to an instruction that, if the jury did not believe that he made the alleged admission, they should find for the defendant. *People v. Bremer*, 69 N. Y. App. Div. 1, 74 N. Y. Supp. 570.

¹ *People v. Fox*, 4 N. Y. App. Div. 38, 38 N. Y. Supp. 635.

² *Commonwealth v. Miller*, 131 Pa. 118, 18 Atl. 938; *Commonwealth v. Hendley*, 7 Pa. Super. Ct. 356, 28 Pittsb. L. J. (N. S.) 401; *Hancock v. State*, 89 Md. 724, 43 Atl. 934.

purposes has been forbidden; and it was held that it was not necessary to allege or prove that the article was kept, used, or served as "butter" by the keeper or proprietor.³ Where a boarding house keeper violated a statute relating to oleomargarine purchased the oleomargarine which was colored to imitate butter, in good faith, believing it to be butter, and there were no circumstances which would lead her to believe that it was not butter it was held that the maximum penalty for such violation of the statute should not be imposed.⁴ Where a person for the purpose of delivering or selling to others selects food, including oleomargarine, with an opportunity for examination; and thereafter delivers such food to guests or patrons, he "furnishes" a substance so delivered within the provisions of a statute prohibiting the furnishing of oleomargarine to a guest or patron of a restaurant without first notifying him that the substance furnished was not butter. In such an instance a waiter in the restaurant serving the guest is liable to punishment.⁵

§ 584. Sale of Oleomargarine in Unlicensed Restaurant.

A statute of Pennsylvania made it an offense to sell oleomargarine without a license as an article of food; or to have it in one's possession with intent to sell it. An unlicensed restaurant keeper furnished oleomargarine to some of his

³ *People v. Berwind*, 38 N. Y. Misc. Rep. 315, 77 N. Y. Supp. 859.

⁴ *People v. Secor* (N. Y.), 113 N. Y. Supp. 487.

An Alabama statute provided that no person should manufacture, sell, offer, or expose for sale, "or have in his possession with intent to sell or serve to persons, guests, boarders, or inmates; in any hotel, eating-house, restaurant," etc., imitation butter. It was held that in construing this statute it should be read as if there was a comma

after the words "to sell," and no semi-colon after the words "inmates," thus: "or have in his possession with intent to sell, or serve to persons, guests, boarders, or inmates in any hotel, eating house or restaurant," etc.; and, when so read, it was not open to the construction that it only prohibits the sale or offer to sell in a hotel, eating house, etc. *Cook v. State*, 110 Ala. 40, 20 So. 360.

⁵ *Welch v. State*, 145 Wis. 86, 129 N. W. 656.

patrons in his restaurant as a part of a meal ordered by them. They did not eat it, but carried it away with them. It was held that this was a sale forbidden by the statute. "It is to prevent adulteration of dairy products, and fraud in the sale thereof, and to protect the public health. It is plain that the exact legislative intent was to prevent the sale, and thereby prevent the use of those adulterations and admixtures as articles of food. It was the use, as food, and the frauds perpetrated upon the public in the sale, which was the mischief to be remedied, and the statute, of course, must be construed with reference to the old law, the mischief and the remedy. That the food was furnished to Mc-Ray and Spence, or so much of it as they saw fit to appropriate, was sold to them, can not be reasonably questioned; when it was set before them it was theirs to all intents and purposes, to eat all, or a part, as they chose, subject only to the restaurateur's right to receive the price, which it is admitted was promptly paid. They might not eat all of the article set before them, but they had an undoubted right to do so; and even assuming that the meal is the portion of food taken, in the sense stated, the transaction must be regarded as a sale wholly within the purport and meaning of the statute. It is certain that the oleomargarine composed a part of the meal, the price of which was paid, and was embraced in the transaction as an integral part thereof. If an unlicensed keeper of a restaurant may set before his guests a bottle of wine or other intoxicating liquor, charging a regular price for the same, with other articles of food furnished, with liberty to take much or little of the liquor as the guest may choose, or, failing to drink it with his meal, permit him to take it away with him, then the liquor laws of the commonwealth are of no avail, and the license to sell liquor is wholly unnecessary. When the liquor is thus furnished and paid for, it is in legal effect a sale, for the very act has been done which it is the policy of the law to prevent, and which it characterizes as a crime, viz., furnishing intoxicating liquors at a price which is paid. So, in this case, the oleomargarine was furnished to the persons named

as food and the price was paid. As the learned judge of the court below well said, it was not given away, and the fact that it was not sold separately, but with other articles for a gross sum, would not make it less a sale. It therefore comes within the letter of the law, and it is also within the spirit. If the use of such articles is injurious, it would seem to be especially within the spirit of the Act to prohibit public caterers from selling them to their guests as part of an ordinary meal."¹ The Legislature has power to make it an offense to furnish a guest oleomargarine without his knowledge.²

§ 585. Disclosing Article Sold is Oleomargarine.

If a statute prohibits the use of coloring matter in oleomargarine so as to make it resemble butter, it is no defense for the sale of an article thus colored that the defendant when he sold it disclosed to the purchaser that the substance was oleomargarine which had been colored to resemble butter. A statute prohibiting the sale of such a colored article is valid.¹ Another New York case was of a different character. Thus an early statute of the State punished the sale of oleomargarine, butterine, suine and other substances which were not butter, the seller representing the article to be butter. A seller sold an article which he represented to be butter, and which on being analyzed was found to contain 75 percent of butter and 25 percent of fatty substances other than butter. The evidence did not disclose that the foreign substance was either oleomargarine, suine, or butterine. The court refused to discharge the seller, holding he was guilty, for the Act prohibited the sale, not only of the various kinds of manufactured butters specified in it, but of any substance not butter, and therefore of any butter adulterated with foreign substance, without regard to the degree of adulteration.²

¹ Commonwealth v. Miller, 131 Pa. 220, 18 Atl. 938, 6 L. R. A. 633, note; 17 Am. St. 798.

² State v. Ball, 70 N. H. 40, 46 Atl. 50.

¹ People v. Meyer, 89 N. Y. App. Div. 185, 85 N. Y. Supp. 834.

² People v. Mahaney, 41 Hun 26.

§ 586. Oleomargarine Under Fancy Name.

The usual statute concerning oleomargarine does not prevent a sale of oleomargarine under a fancy name, if the law with reference to oleomargarine is fully complied with, and clear notice is given to the purchaser that the article is really oleomargarine. Thus where a statute defined "butter," and then declared that "oleomargarine" should mean "all substances, whether compounds or otherwise, prepared in imitation of butter, and whether mixed with butter or not," it was held that no offense had been committed where an inspector asked for half a pound of "Marvo" (a form of margarine), and was served from a mass labeled "Margarine;" and the half pound handed him was wrapped in a paper labeled "Margarine," and inside the paper was a printed slip: "Marvo, the new butter substitute, equal in flavor to the finest dairy butter; to comply with the provisions of the Food and Drugs Act is sold as margarine."¹ In another instance the inspector asked for a half pound of "Keeloma," a sort of margarine. He did not see the bulk until it had been wrapped up. It was given him in a plain brown paper wrapper, underneath which was a second wrapper with the word "Margarine," and inside the second wrapper was a printed label: "Keeloma, the only perfect substitute for butter." Inside the shop were exhibited two notices: (1) "If you ask for butter, you will be served with one of our new substitutes." (2) "Only Keeloma and Overweight, the new butter substitutes, sold here, and to comply with the Food and Drugs Act are sold under the name of margarine." It was held that no offense had been committed in selling the packages to the inspector.²

¹ *Tanner v. Dyball*, 70 J. P. 279, 94 L. T. 539, 21 Cox C. C. 123, 4 L. G. R. 506.

² *Keeloma Dairy Co. v. Jones*, 70 J. P. 533, 5 L. G. R. 246. See also *Pearks, Gunston & Tee v. Houghton*, 71 L. J. K. B. 385 [1902], 1 K. B. 889, 66 J. P. 422, 86 L. T. 325, 50 W. R. 605.

Section 10, 7 Edw. 7, ch. 21, provides that "A name shall not be approved by the Board of Agriculture and Fisheries for use in connection with margarine if it refers to or is suggestive of butter or anything connected with the dairy interest, nor shall such name be approved as a name under which

§ 587. Sale in Sealed Packages.

A statute required oleomargarine to be sold in sealed packages, the original seal of which should not be broken. A package was wrapped in parchment paper with a band around it attached to the seal; but the band was broken so that it was not difficult to open and change the contents of the package. It was held that there had been a violation of the statute.¹

§ 588. Sign that Oleomargarine is Used in Restaurant.

Statutes occasionally require the keeper of a hotel or restaurant who serves his guests or patrons oleomargarine as a substitute for butter to exhibit signs in conspicuous places in the eating or dining room bearing the words "Oleomargarine Used Here" or similar words. Where such a statute is in force an indictment for not so posting up such signs must allege that the defendant furnished oleomargarine to his guests as a substitute for butter.¹

milk-blended butter may be imported or dealt with."

By Section 1 of the same Act "Milk-blended" butter is defined as "any mixture produced by mixing or blending butter with milk or cream other than condensed milk or cream." By Section 4 milk-blended butter is contraband if it "contains more than twenty-four percent of water." The names approved by the Board of Agriculture and Fisheries for this kind of butter are Alimo, Bradlac, Brenco, Camlaw, Casa, Casana, Casmon,

Casora, Casova, Consumo, Dalphine, Debeco, Esselbee, Froco, Fromaid, Iveldale, Iveldene, Ivellette, Ivelmore, Jensa, Kingstyle, Maldar, Me-No, Nolax, Pearks' Breadmate, Pearks' Bredspred, Pearksown, Semaldine, Seeandwi, Ve-vo, and Vivum. Bell's Sale of Food and Drugs Act (5th Ed.) 228.

¹ People v. Fichten (N. Y.), 130 N. Y. Supp. 704.

¹ People v. Redding (N. Y. Misc.), 126 N. Y. Supp. 977.

CHAPTER XVI.

INDICTMENT.

SEC.	SEC.
589. Description of article sold illegally.	599. Sale of adulterated food without informing purchaser.
590. Indictment must show what was the adulteration.	600. Allegation sale was of article of food.
591. Indictment for sale of unlabeled packages.	601. Sale by agent.
592. Negativizing provisions.	602. Milk.
593. Duplicity.	603. Selling adulterated milk at cheese factory.
594. Knowledge of adulteration or unfitness of food.	604. Intention to sell unfit meat.
595. Alleging name of purchaser.	605. Uninspected liquor.
596. Description of defendant.	606. Refusing to furnish samples.
597. Oleomargarine.	607. Failure to label articles of food.
598. Mislabeling or misbranding.	608. The prosecutor.

§ 589. Description of Article Sold Illegally.

A statute made it an offense to sell any compound made wholly or partly out of any fat, oil, oleaginous substance, or compound thereof, not produced directly and at the time of manufacture from unadulterated milk or cream from the same, which should be in imitation of yellow butter produced from pure unadulterated milk or cream from the same. In a criminal prosecution under this statute it was held that the indictment was not open to the objections of insufficient description, or that it did not charge an offense, when it charged a sale of the "article, product or compound," and averred that it was "made wholly or partly out of fat, oil, or oleaginous substance, or compound thereof;" that it was not produced directly and at the time of manufacture from unadulterated milk or cream from the same, and that such article, product or compound was in imitation of yellow butter, produced from pure unadulterated milk or cream from

the same.¹ An affidavit charging that the defendant sold to a certain person, on a day stated, in a certain county of the State, "a certain quantity of food, to wit, ground mustard," has a sufficient description of the article sold.² So a charge that the defendant sold for blackberry wine "a certain compound and mixture consisting of wine, sugar, water, alcohol, salicylic acid and aniline red," is a sufficient description of the adulterated article sold.³ But an indictment charging one with unlawfully and fraudulently adulterating "a certain substance intended for food, to wit, one pound of confectionery," is fatally defective, for "confectionery" is a generic word, and includes a great variety of kinds of articles usually found in a confectioner's shop.⁴ Under a statute prohibiting the manufacture or sale of any food which has been adulterated by adding any substance so as to reduce or injuriously affect its quality or strength, or by substituting any cheaper or inferior substance, an indictment should state the particular substance with which, and the manner in which, the article of food alleged to have been manufactured or sold was adulterated.⁵

§ 590. Indictment Must Show What Was the Adulteration.

In charging that an adulterated article was sold by the defendant, it is necessary to set out what was the adulteration. It is not enough to allege that the accused sold a particular article of food that was adulterated. Thus, where

¹ *Cook v. State*, 110 Ala. 40, 20 So. 360.

² *Haas v. State*, 1 Ohio N. P. 248, 2 Ohio Dec. 177.

³ *Meyer v. State*, 1 Ohio N. P. 241, 2 Ohio Dec. 233.

⁴ *Commonwealth v. Chase*, 125 Mass. 202.

In an instance where one indictment was in lieu of another, see *R. M. Hughes & Co. v. Commonwealth* (Ky.), 101 S. W. 1194, 31 Ky. L. Rep. 179.

Under a statute declaring that a sale of each of several packages shall each one constitute a separate violation of its provisions, one selling adulterated milk is liable in one action to cumulative penalties when he is guilty of a series of violations. *People v. Koster*, 212 N. Y. App. Div. 852, 106 N. Y. Supp. 793.

⁵ *Dorsey v. State*, 38 Tex. Cr. App. 527, 44 S. W. 514, 40 L. R. A. 201.

flour had been adulterated with corn-meal, and then sold, it was held necessary to aver that the adulteration consisted in the mixing of corn-meal with the flour; and it was not sufficient to aver that the accused did "knowingly and fraudulently manufacture, offer for sale, and sell a certain article of food, to wit, flour which was then and there known by him to be adulterated. "There are a number of articles or substances which might be intermingled with flour so as to reduce or lower or injuriously affect its quality or strength, or which are of an inferior or cheaper character; and by our system of pleading the appellant should have been charged with the particular substance with which the article in question was adulterated, so that he might be prepared to meet the State's case."¹

§ 591. Indictment for Sale of Unlabeled Package.

A statute provided that: "No manufacturer or other person or persons shall sell, deliver, prepare, put up, expose or offer for sale any lard, or any article intended for use as lard, which contains any ingredient but the pure fat of healthy swine, in any tierce, bucket, pail, package or other vessel or wrapper, or under any label bearing the words 'pure,' 'refined,' 'family' or other words, alone or in combination with other words of like import, unless every tierce, bucket, pail, package or other vessel, wrapper or label, in or under which said article is sold, delivered or prepared, put up, exposed or offered for sale, bears on the top or outer

¹ *Dorsey v. State*, 38 Tex. Crim. App. 527, 44 S. W. 514, 40 L. R. A. 201.

A complaint in an action for a penalty for keeping and offering for sale adulterated vinegar, alleging that between certain dates defendant manufactured for sale, kept and offered for sale, adulterated vinegar which was made in imitation or semblance of cider vinegar, and that he manufactured,

kept, and offered for sale as and for cider vinegar a vinegar or product which was not cider vinegar as defined by statute, was sufficient under New York Agricultural Law, §§ 50-53 (Laws 1893, pp. 667, 668, ch. 338), defining adulterated vinegar, prohibiting the sale thereof, and imposing a penalty for its violation. *People v. Windholz*, 86 N. Y. S. 1015, 92 App. Div. 569.

side thereof, in letters not less than one-half inch in length, and plainly exposed to view, the words 'compound lard,' and the name and proportion, in pounds and fractional parts thereof, of each ingredient contained therein." An indictment averring a violation of this statute was in the language of such statute so far as it was necessary to constitute an offense, and this was held sufficient. In the construction of the statute, the court said: "If the bucket alleged to have been sold did not bear a statement of the ingredients, the offense was complete, no matter whether the package was stamped 'pure,' 'refined,' 'family' or 'compound lard.'"¹

§ 592. Negating Provisos.

Provisos in statutes excepting certain persons or articles of food from the provisions of the statute need not be negated in the indictment. If a defendant or the article of food falls within their scope, that is a matter of defense to be brought forward by the accused.¹ Thus, one section of a statute made it an offense for any person to have in his possession for the purpose of sale adulterated milk, and another section defined "adulterated milk" as milk containing less than three percent of milk fat, also declaring that the Act shall not prohibit the sale of skimmed milk, when sold as such. It was held that an indictment for having adulterated milk in possession, with intent to sell it, was not objectionable for failing to negative the exception contained in the latter section with reference to skimmed milk.²

§ 593. Duplicity.

An indictment charging that the defendant sold a certain

¹ State v. Snow, 82 Iowa 642, 47 N. W. 777, 11 L. R. A. 355.

¹ Commonwealth v. Mullen, 176 Mass. 132, 57 N. E. 331; Isenhour v. State, 157 Ind. 517, 62 N. E. 40, 87 Am. St. 228; State v. Bockstruck, 136 Mo. 335, 38 S. W. 317; People v. Briggs, 114 N. Y. 56,

20 N. E. 820; People v. Lewis, 131 N. Y. App. 336, 115 N. Y. Supp. 909; Commonwealth v. Kemmeson, 143 Mass. 418, 9 N. E. 761; State v. Luther, 20 R. I. 472, 40 Atl. 9.
² Splinter v. State, 140 Wis. 567.
123 N. W. 97.

quantity of "adulterated milk, to which a large quantity—that is to say, four quarts—of water had been added," is not bad for duplicity.¹ One charging that the defendant "had unlawfully kept, offered for sale and sold" adulterated milk, charged but one offense.² A charge that the defendant "sold to divers citizens 500 pounds of beef as good and wholesome beef and food" is not bad for duplicity.³ A statute prohibited the sale or exposing for sale adulterated milk, and an ordinance punished the bringing of watered or adulterated milk into the city for sale. Where this statute and this ordinance were in force a court, in an indictment, proceeded exclusively upon the ordinance, and it was held that it would not justify a conviction under the general statute, and so was not subject to the objection of duplicity, though it contained averments which might sustain a count for the statutory offense.⁴ An indictment charging selling and exposing for sale adulterated milk is not bad for duplicity.⁵ A charge that the defendant, on the 3d and 4th of August, brought to a certain factory a large quantity of milk diluted with water, alleges but a single transaction, and charges but one offense, though two days are assigned to its commission.⁶ Where a statute provides for the punishment of one selling or having in possession, with intent to sell, adulterated milk, a complaint thereon in two counts, the first charging defendant with selling adulterated milk, and the second with having such milk in his possession for sale, the same milk being intended in both counts, and the possession being on the same day as the sale, and preliminary to it, charges but one offense.⁷

¹ Commonwealth v. Farren, 9 Allen 489.

² Commonwealth v. Nicholas, 10 Allen 199.

³ Goodrich v. People, 19 N. Y. 574, 3 Park. Cr. Rep. 622.

⁴ Polinsky v. People, 73 N. Y. 65, affirming 11 Hun 390.

⁵ People v. Burns, 53 Hun 274, 6 N. Y. Supp. 611.

⁶ People v. Harris, 54 Hun 638, 7 N. Y. Supp. 773.

⁷ Commonwealth v. Tobias, 141 Mass. 129, 6 N. E. 217. A complaint to recover penalties for violation of the Agricultural Law, alleging that plaintiff does not know, and for that reason can not state, the precise number of barrels contained in each sale and purchase

§ 594. Knowledge of Adulteration or Unfitness for Food.

Where it is necessary to show that the defendant made a sale of food, knowing at the time that it was adulterated or unfit for food, it is necessary to allege knowledge on his part of the adulteration or unfitness. And the same is true where the statute does not use the word "knowingly," but the courts interpret the statute so that he must have had knowledge of the adulteration or unfitness of the food at the time of the sale to constitute it an offense. The word "unlawful" can not take the place of the word "knowingly."¹ Where a statute provided that an indictment should be sufficient if it could be understood therefrom that the offense charged was stated with such degree of certainty that the court may pronounce judgment upon a conviction according to the right of the cause; that none should be quashed for any defect or imperfection which does not tend to prejudice the substantial rights of the accused, it was held that an indictment which alleged, on a certain date, the defendant "unlawfully and knowingly had in his possession the meat of a certain diseased and injured animal, to wit, a steer, then and there, with the unlawful intent to sell the meat of said diseased and injured animal for human food," it was a sufficient allegation of the defendant's knowledge of the diseased condition of the meat at the time of the sale. "The charge that the accused 'knowingly' had in his possession the diseased meat would, in our opinion," said the court, "be understood to mean, in the usual acceptation of such words in common language, that he had the meat in his possession, knowing that it was diseased."² In another case the indictment charged

of vinegar, but that plaintiff is entitled to recover a penalty of \$100 for each separate purchase of vinegar which was sold as cider vinegar, but was not such, is objectionable, as, by implication, alleging in a single count an indefinite number of sales, for any one of which plaintiff has a cause of ac-

tion. *People v. Sheriff*, 79 N. Y. S. 783, 78 App. Div. 46.

A sale of ten pieces of diseased meat of the same animal has been held to be ten offenses. *Kenn v. Bell* [1910], S. C. (J.) 13, Ct. of Just.

¹ *Schmidt v. State*, 78 Ind. 41.

² *Brown v. State*, 14 Ind. App.

that the defendant "did, then and there, unlawfully, knowingly and wrongfully kill, for the purpose of selling for food, certain sick, diseased and injured animals," and this was held sufficient to show the defendant knew the animals killed were sick and diseased at the time he killed them. "The charge is," said the court, "that the appellant did 'knowingly' kill for the purpose of selling for food the animals mentioned. The adverb 'knowingly' qualifies not only the verb, did kill, but everything following the same and connected therewith, and will supply the place of a positive averment that the accused knew the facts stated subsequent to the use of such word."³ On the contrary, it is held that, as the vendor must know that the meat he sells is diseased it is not enough to merely allege he did "knowingly sell such provisions."⁴ Under a statute making it an offense to knowingly sell, or have in possession with intent to sell, the meat of a calf killed when less than four weeks old, it is sufficient to charge that the defendant killed a calf, intending to sell its meat, "well knowing that said calf was less than four weeks old."⁵ Where a knowledge of the adulteration is not a necessary element of the offense, then it need not be averred that the defendant knew when he sold the food it was adulterated, and if averred it need not be proven.⁶

§ 595. Alleging Name of Purchaser.

In charging a sale, it is one of the cardinal principles of

24, 42 N. E. 244. The court distinguished this case from *Schmidt v. State*, 78 Ind. 41, by saying it was decided in accordance with the strict rule of common law pleading.

³ *Moeschke v. State*, 14 Ind. App. 393, 42 N. E. 1029.

⁴ *Commonwealth v. Boynton*, 12 Cush. 499; *People v. Worden Grocer Co.*, 118 Mich. 604, 77 N. W. 315.

⁵ *Commonwealth v. Raymond*, 97

Mass. 567; *Lansing v. State*, 73 Neb. 124, 102 N. W. 254.

⁶ *Commonwealth v. Farren*, 9 Allen 489. See also *Hobbs v. Winchester*, 79 L. J. K. B. 1123, [1910] 2 K. B. 271, 102 L. T. 841, 74 J. P. 413, 8 L. G. R. 1872, 26 T. L. R. 557, following *Cundig v. Le Coceq*, 53 L. J. M. C. 125, 13 Q. B. Div. 207; *Mallinson v. Carr*, 60 L. J. M. C. 34, [1891] 1 Q. B. 48, and *Firth v. McPhail*, 74 L. J. K. B. 458, [1905] 2 K. B. 300.

pleading that the name of the purchaser must be given, and the practice is that the name must be proven as laid. If the name be not known, then there must be an allegation that the name is unknown to the grand jurors.¹ But the grand jury may not allege that the purchaser's name is unknown to them, unless it has made a careful investigation to ascertain his name.²

§ 596. Description of Defendant.

Under a statute which makes it an offense only for one engaged in a particular trade or business, it is necessary to allege that, at the time the alleged offense was committed, the defendant was engaged in such trade or business. Thus, under a statute punishing those engaged in the milk business for selling adulterated milk, it must be alleged that the defendant was engaged in the milk business when the offense was committed.¹ So where a statute punishes persons who, being recorded in the books of the milk inspector as dealers, shall knowingly sell adulterated milk, an indictment which, after alleging the official character of the inspector, and that he kept the records and books as required by statute, charges that the defendant, being a dealer, and being recorded as such "in the books of such inspector," did sell, etc., does not sufficiently show that the defendant was recorded in such books as the statute requires the inspector to keep, and is defective.²

§ 597. Oleomargarine.

An indictment for having in his possession, with intent to sell, oleomargarine made partly out of oleaginous substances

¹ Goodrich v. People, 3 Parker Cr. Rep. 622; People v. Burns, 53 Hun 274, 6 N. Y. Supp. 611, 7 N. Y. Crim. Rep. 92; Feigen v. McGuire, 64 N. J. L. 152, 44 Atl. 972.

² Marxen v. State, 44 Tex. Cr. App. 41, 68 S. W. 277.

¹ Commonwealth v. Flannally, 15 Gray 195.

² Commonwealth v. O'Donnell, 1 Allen 593; Commonwealth v. McCarron, 2 Allen 157. That it is not necessary to allege that the defendant was a registered milk dealer, see State v. Luther, 20 R. I. 472, 40 Atl. 9.

in imitation of yellow butter, produced from unadulterated milk or cream, need not allege it was not "renovated butter" where the possession of such butter is made an offense by another statute, the substance described in the indictment differing from that named in the latter statute.¹ It need not be alleged the oleomargarine was fraudulently sold.² Where a statute prohibits the sale of oleaginous substance colored in imitation of butter, and not made from adulterated milk or cream, alleging that the "defendant did sell two pounds of an oleaginous substance compounded and colored in imitation of yellow butter produced from pure milk or the cream from the same, and such oleaginous substance and compound not having been produced directly and wholly, at the time of the manufacture thereof, free from coloration or ingredient that caused it to resemble yellow butter produced from unadulterated milk," does not sufficiently charge that the substance sold was not produced from unadulterated milk or cream.³ Where a statute provided that no person should coat, powder or color butterine or oleomargarine, or any compound of it, an indictment charging a sale of two pounds of oleomargarine colored with annatto, whereby it was made to resemble butter, is good.⁴ If the offense is selling as natural butter, produced from unadulterated milk or cream, any oleomargarine or other substance made in imitation of butter from animal fats, or animal or vegetable oils not the product of the dairy, the indictment must show that the oleaginous substance sold was made from animal fats or animal or vegetable oils not the product of the dairy.⁵ An indictment charging a person with selling oleomargarine which, when sold, contained coloring matter, to wit, butter yellow, is sufficient, though it contains descriptive words which partially bring the substance within the statutory definition of oleomargarine.⁶ An indictment upon a statute prohibiting "the

¹ *Commonwealth v. Mullen*, 176 Mass. 132, 57 N. E. 331.

² *Fox v. State*, 94 Md. 143, 50 Atl. 700, 89 Am. St. 434.

³ *State v. Henderson*, 15 Wash. 598, 47 Pac. 196.

⁴ *Rasch v. State*, 89 Md. 755, 43 Atl. 931.

⁵ *People v. Laming*, 40 N. Y. App. Div. 227, 57 N. Y. Supp. 1057.

⁶ *State v. Arata*, 69 Ohio St. 211, 68 N. E. 1046.

manufacture and sale of oleomargarine, butterine and other similar products," is not bad because the disjunctive "or" is used between the words "oleomargarine" and "butterine." But an indictment in the disjunctive, charging that the defendant kept for sale an article made by "adding to milk, cream or butter, animal fats or animal or vegetable oils," was held sufficient.⁸ Yet an indictment for having in possession, with intent to sell, oleomargarine made partly out of oleaginous substances not produced from unadulterated milk or cream, is not in the alternative, as alleging that the substance was made from adulterated milk or cream, since if all the substances of which it was composed were produced either from unadulterated milk, or cream therefrom, no offense could be charged.⁹

§ 598. Mislabeling or Misbranding.

A statute provided that no person should sell lard, or any article intended for use as lard, which contained any ingredient except the pure fat of healthy swine, under any label bearing the words "refined," "pure," "family," unless every package in which the article was sold was marked "compound lard." It was held that an information charging a violation of such Act is sufficient if it alleges, in substance, that the defendant sold a package, or bucket, filled with an article intended for use as lard which contained other ingredients than pure fat of healthy swine, and that such bucket or package did not bear on the top or outer side the name, and proportion in pounds and fractional parts thereof, of each ingredient contained therein, without alleging that it

⁷ Commonwealth v. McDermott, 37 Pa. St. Rep. 1.

⁸ Ryan v. State, 5 Ohio Cir. Ct. Rep. 486.

⁹ Commonwealth v. Mullen, 176 Mass. 132, 57 N. E. 331; People v. Lewis, 131 N. Y. App. 336, 115 N. Y. Supp. 909.

Under a statute requiring the keeper of a hotel or restaurant

serving his guests with oleomargarine "as a substitute for butter" to put up signs in the serving or dining room bearing the words "oleomargarine Used Here," the indictment must allege that the defendant furnished the oleomargarine to his guests "as a substitute for butter." People v. Redding, 142 N. Y. App., 126 N. Y. Supp. 977.

was stamped "pure," "family" or "compound" lard.¹ A statute prohibited the misbranding or adulteration of any article of food, defined "food" as an article used for food for man or domestic animals, and declaring that an article was misbranded where the label bears any false statement concerning the substances of which the article was made, and that an article was adulterated where any substances were mixed with the article so as to injuriously affect the article. Under this statute an indictment alleging that the defendant sold and delivered a product for food for domestic animals, that the product was branded as described, and was guaranteed to contain certain articles, that the label was untrue, and that the product was largely adulterated, it was held to be sufficient.²

§ 599. Sale of Adulterated Food Without Informing Purchaser.

Where a statute makes it an offense to sell adulterated food without informing the purchaser of its adulteration, then it is not enough to charge a sale of such food without alleging a failure to inform the purchaser of its true condition.¹

§ 600. Allegation that Sale was of Article for Food.

As a rule, it need not be averred that a sale of an adulterated article was a sale of the article to be used as human food.¹ A charge of a sale of adulterated milk need not allege that the milk was an article of food,² and if the statute

¹ *State v. Snow*, 81 Iowa 642, 47 N. W. 777, 11 L. R. A. 355.

² *W. H. Small & Co. v. Commonwealth*, 134 Ky. 272, 120 S. W. 361.

¹ *State v. Falk*, 38 Mo. App. 554; *Commonwealth v. Boynton*, 12 Cush. 499.

¹ *State v. Kelly*, 53 Ohio St. 667, 43 N. E. 163, reversing 1 Ohio N. P. 238, 2 Ohio Dec. 239; *Common-*

wealth v. Kolb, 13 Pa. Super. Ct. Rep. 347 (sufficient after verdict).

A charge of a sale of milk "as and for pure milk, an article of food," is a sufficient allegation that it was sold as an article of food. *Lansing v. State*, 73 Neb. 124, 102 N. W. 254.

² *State v. Smith*, 69 Ohio St. 196, 68 N. E. 1044.

prohibits a sale of adulterated milk it need not be alleged that the milk sold was cow's milk.³ If the statute makes it an offense to sell adulterated wine as a beverage, then the statute must charge a sale of wine as a beverage or it will be bad.⁴ A charge of a sale of cream of tartar for a drug is not supported by evidence showing a sale of the article as a food, even though the statute make a sale of such an article as a food an offense.⁵

§ 601. Sale by Agent.

Where a sale is made by an authorized agent the charge may be that the principal made the sale, and proof that the principal's authorized agent sold it will support the indictment. Thus, a statute required that, in a sale at retail of any compound in imitation of butter, "the seller or his agents" should attach to each package a label of a specified character describing the article; it was held that the indictment need not allege that the sale with which the defendant was charged was actually made by an agent, in order to let in proof of that fact.¹ Yet, where a statute made it an offense for any one, by himself or agent, or as servant or agent of another person, to sell milk from which the cream had been removed, an indictment charging a principal with an improper sale was held insufficient where the sale was made by an agent.² When the person to be prosecuted is the seller or consignor himself, and the indictment alleges a sale by the consignor "by the hands of A. B., his servant or agent," and it turns out that A. B. was not his servant or agent for sale, but merely a carrier, there is a fatal variance.³ Where a statute provided that "No person, either by his servant or agent, or as servant or agent of another person," should sell

³ Commonwealth v. Farren, 9 Allen 489.

⁴ Vester v. State, 1 Ohio N. P. 240, 2 Ohio Dec. 170.

⁵ People v. Fuller, 12 Abb. N. C. 196.

¹ Commonwealth v. Gray, 150

Mass. 327, 23 N. E. 47; Williams v. State, 25 Ohio Cir. Ct. Rep. 673.

² Heider v. State, 4 Ohio S. & C. P. Dec. 227.

³ Hiatt v. Ward, 58 J. P. 481, 70 L. T. 374, 10 T. L. R. 284.

impure food, it was held that an indictment charging that the accused sold such food was insufficient, for it should have alleged that the defendant made the sale "by his servant" or "by his agent," or "by his servant and agent."⁴

§ 602. Milk.

A charge in an indictment that the defendant sold to one T. a quantity of milk as pure milk, to which a quantity of a substance had been added which was poisonous, was held sufficient.¹ When a statute defines adulterated milk to be milk containing more than 87 percent of watery fluid, or less than 13 percent of milk solids, it is sufficient to allege, on a charge of having adulterated milk in possession with intent to sell it, that defendant had in his possession, with intent to sell, a certain quantity of adulterated, "to wit, milk containing less than 13 percent of milk solids," and it need not be alleged what reduced the milk below the legal standard.² Nor need it be alleged that there had been an analysis which showed that the milk had been adulterated, even where the statute provides for an official analysis.³ Where a statute provided that "whoever fraudulently adulterates, for the purpose of sale, bread or any other substance intended for food, with any substance injurious to health, or knowingly barter, gives away, sells, or has in his possession with intent to sell, any substance injurious to health," should be fined, an indictment charging one with having for sale adulterated milk need not disclose where or how the evidence against him was procured; and if it be charged that the milk was "adulterated with a certain substance injurious to health, to wit, formaldehyde," it need not be alleged that formaldehyde is

⁴ *State v. Squibb*, 170 Ind. 488, 84 N. E. 969.

¹ *Lansing v. State*, 73 Neb. 124, 102 N. W. 254.

² *Commonwealth v. Keenan*, 139 Mass. 193, 29 N. E. 477.

³ *Commonwealth v. Bowers*, 140 Mass. 483, 5 N. E. 469; *Common-*

wealth v. Tobias, 141 Mass. 129, 6 N. E. 217; *St. Louis v. Bippen*, 201 Mo. 528, 100 S. W. 1048; *St. Louis v. Schottell* (Mo.), 100 S. W. 1049; *Vandergrift v. Miehl*, 66 N. J. L. 92, 49 Atl. 16; *State v. Luther*, 20 R. I. 472, 40 Atl. 9.

either poisonous or injurious to health. Nor need it be alleged, where possession of adulterated food is charged, that the defendant adulterated it, and it need not be alleged the milk violated a certain standard fixed by the State Board of Health. "Appellant is not charged with violating a standard," said the court, "and the character of the act for which he is prosecuted is not determined by a standard. He is called upon to answer for having in his possession with intent to sell milk adulterated with a substance injurious to health. The having in possession with intent to sell adulterated food that may in any material degree injuriously affect the health of the consumer is positively forbidden by that provision of the law under which appellant is prosecuted. Whether or not the Board of Health had fixed standards of purity in the matters required of them can not avail one as a defense to a charge in which no standard is required. It is not necessary for the indictment to show that the State Board of Health had prepared rules and ordinances, and defined adulterations, and that the milk in possession of appellant violated some rule, ordinance or standard. The offense with which appellant is charged is independent of all action of the board, and is not affected by anything they may do or leave undone."⁴ The quantity of the foreign substance added to milk need not be alleged where the charge is having in possession adulterated milk with intent to sell it. Such was held to be the case where the foreign substance added was putting annatto into it to color it.⁵ The indictment need not separately state and number the causes of action when they are based on the sale of several cans of milk at one sale, and to so state and number them would make it of ridiculous length and defeat the object of reducing pleadings to the simplest form.⁶ But there can be separate infor-

⁴ *Isenhour v. State*, 157 Ind. 517, 62 N. E. 40.

⁵ *Commonwealth v. Schaffner*, 146 Mass. 512, 16 N. E. 280.

⁶ *People v. Liberman Dairy Co.* (N. Y.), 109 N. Y. Supp. 1067;

People v. Buell, 85 N. Y. App. Div. 141, 83 N. Y. Supp. 143. See *People v. Koster*, 121 N. Y. App. Div. 852, 106 N. Y. Supp. 793; *Carter v. State*, 122 Ga. 175, 50 S. E. 64.

mations laid in respect of samples taken from more than one can. Thus where an inspector procured a sample from each of five cans in the course of delivery, and, upon its being found that there was a deficiency of cream in two of the samples submitted for analysis, laid two separate informations in respect of them, it was held that the procuring of each sample was a separate transaction, and that the milk-seller had committed a separate offense in respect of each one which was deficient, and that, therefore, the two informations were properly laid, and that there could be two convictions.⁷

§ 603. Selling Adulterated Milk at Cheese Factory.

Where a statute punished any person selling, supplying or bringing to be manufactured into cheese or butter to any butter or cheese factory, any milk diluted with water, an indictment alleging that the defendant brought to a certain named cheese factory, for the purpose of being manufactured into cheese and butter, a large quantity of milk diluted with water, and that such milk was delivered to a person named, for the purpose of cheating and defrauding him, contains a sufficient charge of the crime thereunder.¹ Charging that he brought the milk on the 3d and 4th day of a particular month describes only a single transaction.² A charge that the defendant did wrongfully, unlawfully and knowingly supply and bring to be manufactured into cheese, to a cheese factory, then and there situate, a certain quantity of milk, which milk was then and there diluted with water, for the purpose of having it manufactured into cheese, is likewise sufficient.³

⁷ *Feat v. Walsh* [1891], 2 Q. B. 304, 55 J. P. 726, 60 L. J. M. C. 143, 65 L. T. 82, 39 W. R. 525, 17 Cox C. C. 322.

The Scottish court, however, dissented from this case. *Telford v. Fyfe* [1908], Sess. Cas. (J.) 83.

Under Laws of N. J. 1882, p. 97, § 4, the complaint for selling adulterated milk must be special. *State v. Newton*, 45 N. J. L. 469.

The offense of selling adulterated milk may be charged in the language of the ordinance making it an offense. *St. Louis v. Ameln* (Mo.), 139 S. W. 429.

¹ *People v. Harris*, 54 Hun 638, 7 N. Y. Supp. 773.

² *People v. Harris*, *supra*.

³ *People v. West*, 106 N. Y. 293, 12 N. E. 610, 60 Am. Rep. 452; *People v. West*, 44 Hun 162.

If the particular offense intended to be proved is the bringing of skim milk to a full cream cheese factory, it should be alleged that the milk in question was milk from which the cream had been taken, and that the factory to which it was brought was a full cream cheese factory, or was not a skim cheese factory. One of the general character above stated is not insufficient in such an instance.⁴

§ 604. Intention to Sell Unfit Meat.

A statute of Vermont made it an offense to sell or keep with intent to sell the flesh of calves which were less than four weeks old when killed, and it was held that an allegation that the defendant "in the said county," naming the county of the prosecution, on a certain date "did then and there keep with intent to sell" such flesh, sufficiently laid the place of the intended sale within the State, since, when the offense charged was a misdemeanor, if time and place be added to the first act alleged, it is deemed to be connected with all the facts subsequently added.¹

§ 605. Uninspected Liquors.

Where a statute made it an offense to sell uninspected food and liquors, it was held not sufficient to merely allege that the liquor had not been inspected in the county where sold, and that the cask from which it was taken did not have the inspector's brand of any county.¹

§ 606. Refusing to Furnish Samples.

In a prosecution of a person for refusing to furnish a sample of an article of food offered for sale, for analysis, it was held that it must be distinctly stated what statute had been violated, and that it was not enough to say the defendant refused to furnish for analysis a sample, contrary to an Act

⁴ *People v. Spees*, 18 N. Y. App. Div. 617, 46 N. Y. Supp. 995.

¹ *State v. Peet*, 80 Vt. 449, 68

Atl. 661, 130 Am. St. 998, 14 L. R. A. (N. S.) 677, note.

¹ *Woodworth v. State*, 4 Ohio St. 487.

passed on a certain day.¹ In such an instance the names of the persons refused must be given,² and it must also be alleged that the article of food was "demanded."³

§ 607. Failure to Label Articles of Food.

One section of a statute provided that every person who should manufacture for sale, or offer for sale, oleomargarine, should cause every parcel to be stamped, and every retailer should cause every package sold by him to be stamped. Another section provided that every person who should sell or offer to sell, or have in his possession with intent to sell, oleomargarine without being stamped, and that every retailer who sold a package without delivering it labeled, as required by the first section, should pay a fine. A third section provided that every person who should sell, or offer or expose for sale, oleomargarine, without having it stamped or labeled, should be guilty of a misdemeanor. An indictment charged that the defendant had in his possession oleomargarine, with intent to sell the same, without delivering to the purchaser a printed label bearing the word "oleomargarine," and it was held to charge no crime.¹

§ 608. The Prosecutor.

The general rule is that the action to recover a penalty for a violation of a statute is brought in the name of the State by the ordinary prosecuting officer, by indictment or affidavit, and the fact that an inspector or Board of Health is charged with the duty of enforcing the food adulteration law does not necessarily mean that the action must be brought in his name or that he must be instrumental in bringing it. Thus, where a statute declared that "it shall be the duty of the State Board of Health to enforce the laws of this State governing food and drug adulterations," it was held

¹ *Margolius v. State*, 1 Ohio N. P. 264.

² *Margolius v. State*, 1 Ohio N. P. 264.

³ *Margolius v. State*, 1 Ohio N. P. 264.

¹ *Pierce v. State*, 63 Md. 592.

not necessary for the State board to institute or cause to be instituted proceedings to have a fine assessed for having in possession milk into which formaldehyde had been put. "We can not believe," said the court, "that the General Assembly, by imposing a special duty upon specified officers to enforce the statute, meant that individuals should be excluded from making complaint. The law is general and has a general application. The interdictions prescribed by the Act are for the public welfare, as much for one as for another, and it can not be assumed that the Legislature, by conferring a duty upon certain officers to enforce the law, intended that its enforcement should depend wholly upon the pleasure or discretion of such officers. We see no reason for distinguishing this from other public offenses in its general object and purpose, or why any one entitled to the law's protection may not institute its enforcement, as he may, ordinarily, do in other cases. The evident intent was to confer upon the State Board of Health official duty, in addition to common individual right, to put the law in motion in proper cases."¹ A statute requiring the Commissioner of Agriculture to cause an action or proceeding "to be brought in the name of the people," to recover a penalty, does not require an allegation that the action was brought by him.²

¹ *Isenhour v. State*, 157 Ind. 517, 62 N. E. 40, 87 Am. St. 228; *Commonwealth v. Gay*, 153 Mass. 211, 26 N. E. 852; *Commonwealth v. McDonnell*, 157 Mass. 407, 32 N. E. 361; *Commonwealth v. Davison*, 11 Pa. Super. Ct. Rep. 130; *Com-*

monwealth v. Mullen, 176 Mass. 132, 57 N. E. 331; *Commonwealth v. Spencer*, 28 Pa. Super. Ct. 301.
² *People v. Lamb*, 85 Hun 171, 32 N. Y. Supp. 584; *People v. Braested*, 30 N. Y. App. Div. 401, 51 N. Y. Supp. 824.

CHAPTER XVII.

EVIDENCE.

SEC.

609. Oleomargarine.

610. Milk.

611. Agent's representations.

612. Diseased meat.

613. United States Pharmacopoeia.

614. Preponderance of evidence—
Reasonable doubt.

SEC.

615. Sample obtained illegally.

616. Miscellaneous.

617. Judicial notice of United
States Pure Food Regulations.618. Analyst's certificate making a
prima facie case.

§ 609. Oleomargarine.

Where a statute prohibited a sale of imitation butter, but declared that the "sale of oleomargarine in such manner as will advise the consumer of its real character, free from coloration or ingredient that causes it to look like butter, by having it stamped with its true name," it was held, in a prosecution for the sale of oleomargarine in violation of its provisions, that evidence was admissible to show that the oleomargarine sold was of the color of yellow butter.¹ So a witness may testify that the article sold had the appearance of butter.² If it be shown that the substance sold had coloring in it, it will be presumed that the oleomargarine sold for butter was actually colored to imitate butter.³ Under an indictment charging a sale of oleomargarine colored yellow to resemble butter, if it is competent for the defendant to prove that cotton-seed oil is, in a commercial sense, a necessary constituent of oleomargarine, it is equally competent for the prosecution to introduce explanatory evidence in rebuttal that the necessary result of the use of cotton seed is not to

¹ Cook v. State, 110 Ala. 40, 20
So. 360.

² People v. Berwind, 38 N. Y.

Misc. Rep. 315, 77 N. Y. Supp.
859.

³ People v. Teele, 131 N. Y. App.
87, 115 N. Y. Supp. 212.

give the product in which it is used the color of yellow butter.⁴ In such an instance a conviction may be sustained, although there is no evidence of the artificial coloration of the oleomargarine by the addition thereto, in the process of manufacture or afterwards, of any substance which had no other function than to cause it to resemble and be in imitation of yellow butter.⁵ If the defendant claims that all oleomargarine, when there is no ingredient introduced solely for coloring purposes, is naturally yellow in color, the prosecution may then put in a sample of the oleomargarine white in color.⁶ But a witness can not be asked how the article sold compared in color with the butter made in the vicinity for certain foreign markets, and whether it would pass in such markets so far as its color was concerned.⁷ Where a statute punished the sale of oleomargarine by any person representing the article to be butter, and provided that the sale and representation should be presumptive evidence of guilt, it was held that the presumption was not met by showing the absence of knowledge of the adulteration and of an intent to deceive, but only by controverting the prosecutor's evidence showing the sale and false representations.⁸ On a prosecution of an accused for having in his possession, with intent to sell, oleomargarine in a tub not marked, it was shown that on the date of the alleged offense the tub was not exposed for sale, nor so situated that it would be seen by the accused's customers; that it was at the bottom of a large refrigerator in the basement of his store; that he purchased it in another State, and had not seen it since the date of its arrival; that he bought it with intent to sell the oleomargarine at retail in his store, but he did not intend to sell it or expose it for sale until the marks had been examined, and, if not marked in accordance with the statute, to mark the tub before opening it; it was held that this was not evidence sufficient upon

⁴ Commonwealth v. Mellett, 27 Pa. Super. Ct. 41.

⁵ Commonwealth v. Mellett, *supra*.

⁶ Commonwealth v. Caulfield, 87 Pa. Super. Ct. 279.

⁷ Meyer v. State, 134 Wis. 156, 114 N. W. 501.

⁸ People v. Mahaney, 41 Hun. 26.

which to convict the accused.⁹ An admission by the defendant that he had been fined for an unlawful sale of oleomargarine during his previous operations is without force to charge a complicity in a subsequent unlawful sale by another.¹⁰ Courts will not take judicial notice of the natural appearance of oleomargarine.¹¹ The system of the accused's business may be shown by proof of other like crimes when it is necessary to prove an intent to violate the statute.¹² When a statute in one section required that every person manufacturing or selling any substance made in the semblance of lard should cause the package containing it to be labeled "Lard Substitute," and another section provided that such Act should not apply to cottolene, when the package was labeled "Cottolene," but prohibiting the manufacture of cottolene in imitation of lard, it was held that evidence that the defendant sold cottolene resembling lard, and as a substitute for it, without the packages being labeled "Lard Substitute," was sufficient to sustain a conviction.¹³

§ 610. Milk.

When a statute forbade a sale or exposure for sale of any impure, unhealthy or adulterated milk, and defined adulterated milk to be milk having more than 88 percent of water, except skimmed milk for use in the county in which it was produced, and the evidence showed that the accused had several milk cans in his store containing cream, pure milk and skimmed milk, respectively, and when the inspectors called on him he told them to step back where the milk was kept and help themselves, and it did not appear from which can the milk analyzed by the inspectors was taken, or that accused exposed for sale the milk analyzed as pure milk, or otherwise than as skimmed milk, it was held that the evidence

⁹ *Commonwealth v. Mills*, 157 Mass. 405, 32 N. E. 360; *Commonwealth v. McDonnell*, 157 Mass. 407, 32 N. E. 361.

¹⁰ *Goll v. United States*, 166 Fed. 419, 92 C. C. A. 171.

¹¹ *People v. Meyer*, 44 N. Y. App. Div. 1, 60 N. Y. Supp. 415.

¹² *Commonwealth v. McDermott*, 37 Pa. Super. Ct. 1.

¹³ *State v. Hanson*, 84 Minn. 42, 86 N. W. 768, 54 L. R. A. 468.

was not sufficient to sustain a conviction.¹ Where a witness testified that he had skimmed the milk by the defendant's direction, and sold it from unmarked cans, it was held that the jury had the right to infer that the employe watered the milk by the same authority, so as to constitute an adulteration within the meaning of the Act.² Upon a charge of a sale of adulterated milk under a statute declaring that "adulterated milk" means milk containing less than a certain percent of fluids, the accused may show that there had been no physical interference with the milk since it had been taken from the cows, though the chemical analysis showed that it contained an excess of fluids.³ Proof that milk was found in a milk wagon on the street of a city, and was intended "for delivery down town," does not show a sale, nor offer for sale, nor exposure for sale, there being no evidence that the delivery was to be a sale, or in pursuance of a sale. No presumption of intent to sell adulterated milk arises from the mere fact of possession of it, under a statute providing that the doing of anything forbidden by it shall be evidence of a violation thereof, without regard to the intent of the person so doing.⁴ But adulterated milk is shown to have been "offered or exposed for sale" by evidence that the accused was delivering milk to regular customers at the time a can of impure milk was found in his wagon, though after it was analyzed he returned it to the person from whom he bought it, and was credited with the price.⁵ Where a statute provides that milk shown to contain more than 88 percentage of watery fluids, or less than 12 percent of milk solids, or less than 2½ percent of milk fat, shall be deemed to be adulterated, it is necessary to prove only that the milk tested failed in some one of these particulars.⁶ If a person temporarily

¹ *People v. Thompson*, 60 Hun Misc. Rep. 135, 43 N. Y. Supp. 582, 14 N. Y. Supp. 819. 290, 11 N. Y. Cr. Rep. 479.

² *Commonwealth v. Hough*, 1 Pa. Dist. Rep. 51.

³ *People v. Salisbury*, 2 N. Y. App. Div. 39, 37 N. Y. Supp. 420.

⁴ *People v. Wright*, 19 N. Y.

⁵ *People v. Koch*, 19 N. Y. Misc. Rep. 634, 44 N. Y. Supp. 387; *People v. Gilmor*, 73 N. Y. App. Div. 483, 77 N. Y. Supp. 273.

⁶ *State v. Luther*, 20 R. I. 472, 40 Atl. 9.

in charge of defendant's milk wagon unauthorizedly sell milk from it, and he had never before sold milk for the defendant, and did not account to the owner for the money received therefor, the defendant can not be convicted of a sale of the milk on the ground that it was adulterated.⁷ A variance between an averment for selling adulterated milk that the milk was sold to a woman, and proof that the woman in buying the milk was acting as her husband's agent, is not fatal where the defendant had no notice, express or implied, at the time of the sale, that the woman was acting as agent of the alleged purchaser.⁸ An indictment charging that the accused had in his possession, with intent to sell it, "one pint of adulterated milk, to which milk water had been added," is not supported by proof that the milk was adulterated by adding water to pure milk, for the allegation is descriptive.⁹ Upon a charge of having possession of adulterated milk, with intent to sell it, evidence that the accused was upon a wagon on which his name was painted, and that in the wagon were cans of milk from which he gave a sample to a person in the employ of the milk inspector for analysis, is admissible on the issue whether he was in possession of the milk with intent to sell it.¹⁰ Such evidence is sufficient to show an intent to sell.¹¹ Upon a charge of a sale of adulterated milk, the accused can not prove for what purpose he had the milk in hand, that being immaterial, if he sold the milk when it was adulterated.¹²

⁷ *Diersing v. State*, 29 Ohio Cir. Ct. Rep. 469.

⁸ *Commonwealth v. Farren*, 9 Allen 489.

⁹ *Commonwealth v. Luscomb*, 130 Mass. 42.

¹⁰ *Commonwealth v. Rowell*, 146 Mass. 128, 15 N. E. 154.

¹¹ *Commonwealth v. Smith*, 143 Mass. 169, 9 N. E. 631.

¹² *Weigand v. District of Columbia*, 22 App. D. C. 559.

In an action against a milk ven-

dor to recover a penalty prescribed by New York Laws 1893, ch. 338, § 37, for selling adulterated milk, which defendant had purchased from the producer, evidence of defendant and his wife that they had not tampered with the milk was incompetent, where the fairness of the samples shown to be adulterated or of the analysis was not impugned. *People v. Laesser*, 79 N. Y. S. 470, 79 App. Div. 384.

§ 611. Agent's Representations.

The representations of an agent made in the line of his duty are admissible in an action against his principal concerning the transactions of the agent. Thus, one employed to sell milk at retail from house to house may bind his employer by representations to customers as to the quality of the milk furnished, since such representations are within the scope of his apparent authority; but representations made by him to agents of a department of the government having charge of the enforcement of the pure food laws are not binding on the principal, especially in criminal actions for a violation of such laws.¹

§ 612. Diseased Meat.

The court will take judicial knowledge that a running sore on the head of a cow renders her unfit for food.¹ If there be evidence that the meat of a certain animal was diseased, and certain purchasers testify that it was good, the mere fact that the leg of the animal was broken and a portion of the leg swollen when killed, which parts were not sold, is not sufficient to sustain a conviction.² On an indictment for selling diseased meat without making it known to the buyer, it is sufficient for the State to prove that the accused knowingly sold such meat, the presumption arising from such proof that the sale was unlawful, and it being incumbent on the accused to prove that he disclosed to the buyer that the meat was unsound.³

§ 613. United States Pharmacopoeia.

Where there had not been incorporated in the pure food law of Michigan any specific formula for the manufacture of lemon extract, it was held proper to resort to the United

¹ *People v. Terwilliger*, 59 N. Y. Misc. 615, 110 N. Y. Supp. 1034.

² *Marxen v. State*, 44 Tex. Cr. App. 41, 68 S. W. 277.

³ *Goodrich v. People*, 19 N. Y. 574, affirming 3 Parker Cr. Rep. 622.

³ *Seibright v. State*, 2 W. Va. 591.

States Pharmacopoeia formula to determine of what lemon extract consisted.¹

§ 614. Preponderance of Evidence—Reasonable Doubt.

In an action in a criminal case to recover a penalty of the defendant for having violated the pure food laws, it must be shown beyond a reasonable doubt that the defendant is guilty of the charge laid against him. But many of the statutes make such proceedings only quasi-criminal. In such an instance the jury may find against the defendant on a preponderance of the evidence, and need not be satisfied beyond a reasonable doubt that he has violated the statute, even though the action be brought in the name of the State. Such was held to be the case of the New York statute.¹

§ 615. Sample Obtained Illegally.

The fact that a sample of the adulterated food sold or exposed or offered for sale was obtained illegally will not prevent its introduction in evidence.¹ The fact alone that the only interstate shipment shown of misbranded food by the manufacturer was secretly induced by an agent of the prosecutor is no defense.²

§ 616. Miscellaneous.

If the evidence clearly shows that the defendant had knowledge of the adulteration of the food, it is not error to exclude his testimony to the effect that he had no such knowledge.¹ Upon a charge of manufacturing, selling and exposing for sale a compound of pure honey and other syrup "for pure honey," the label attached thereto was misleading, in that the word "honey" was printed in large, full type,

¹ *People v. Jennings*, 132 Mich. 662, 94 N. W. 216, 10 Detroit Leg. N. 39.

¹ *People v. Briggs*, 114 N. Y. 56, 20 N. E. 820.

¹ *Commonwealth v. Byrne*, 158 Mass. 172, 33 N. E. 343.

² *United States v. Morgan*, 181 Fed. 587.

¹ *Meyer v. State*, 1 Ohio N. P. 241, 2 Ohio Dec. 233.

and the word "compound" in smaller and lighter faced type, and the ingredients, "honey and syrup," in still smaller type. The accused testified that he made the compound, using one-half pure honey and one-half corn syrup; that when the compound was sold to the purchaser he sold it for compound honey, and told him that it was not pure honey. It was held that, whether the accused manufactured for sale, sold and exposed for sale "any compound or mixture branded or labeled as and for honey," which was made of honey mixed with any other substance or ingredient prohibited by the statute, was a question for the jury.² Evidence that the effect of coal-tar dye in vanilla extract was to make the extract appear stronger and of greater value than it really was, is sufficient to authorize the submission to the jury of the question whether the extract containing such dye was inferior.³

§ 617. Judicial Notice of United States Pure Food Regulations.

The State courts can not take judicial notice of the United States Department of Agriculture concerning pure food or the standard fixed by it for milk, even though the State statute upon which the prosecution is based provides that milk sold within the State must be of the standard fixed by such regulations.¹

§ 618. Analyst's Certificate Making a Prima Facie Case.

The certificate of an analyst or chemist who has examined milk, that it is impure, is prima facie evidence of its impurity, and calls upon the defendant to show that it is pure.¹

² *People v. Berghoff*, 112 N. Y. App. Div. 772, 99 N. Y. Supp. 201, affirming 47 N. Y. Misc. Rep. 1, 95 N. Y. Supp. 257.

³ *People v. Hinshaw*, 135 Mich. 378, 97 N. W. 758, 10 Detroit Leg. N. 794.

¹ *St. Louis v. Kruempeler* (Mo.), 139 S. W. 446.

¹ *Kench v. O'Sullivan*, 10 N. S. W. L. R. 605, 27 W. N. (N. S. W.) 137.

CHAPTER XVIII.

DRUGS AND DRUGGISTS.

SEC.

618a. Constitutionality of statute relating to.

618b. Licensing druggists and their qualifications.

SEC.

618c. What is a drug.

618d. Proprietary medicines—Original packages.

618e. United States Pharmacopeia.

§ 618a. Constitutionality of Statutes Relating To.

The State, under its police power, may not only regulate the sale of drugs, but it may require that those sold shall be pure and unadulterated. In respect to adulteration of drugs, the power to prevent their sale and the imposition of them upon the public is the same as in case of adulterated and unwholesome food.¹ A provision in a statute requiring pharmacists to be registered, which permits shopkeepers whose places of business are more than one mile from a drugstore to sell the commonly used medicines and poisons if put up by a registered pharmacist, but prohibiting such sales within that distance, is reasonable and valid, and is not an arbitrary discrimination.²

§ 618b. Licensing Druggists, and Their Qualifications.

In order to secure the careful handling of drugs the State may require those selling them to have certain qualifications and to take out a license to sell them. This is the exercise of the State's police power.¹ The State may prohibit itin-

¹ State v. Williams, 93 Minn. 155, 100 N. W. 641; Ex parte Hallowell, 8 Cal. App. 563, 97 Pac. 320.

² State v. Donaldson, 41 Minn. 74, 42 N. W. 781.

¹ Watson v. State, 45 Tex. Cr.

App. 509, 78 S. W. 504; Henkel v. Mullard, 97 Md. 24, 54 Atl. 657; State v. Hall, 109 La. 290, 33 So. 318; State v. Horner, 52 W. Va. 373, 43 S. E. 89; Commonwealth v. Hovious, 112 Ky. 491, 66 S. W. 3, 23 Ky. L. Rep. 1724; State v.

erant merchants selling drugs.² It may not only require a druggist to take out a State license, but may authorize a municipality to exact another one.³ These statutes as a rule do not apply to the mere ownership of drugstores, where it is made an offense for one to compound or sell drugs if he has a licensed employe who compounds and makes the sales.⁴ But if, in such an instance, the owner takes part in the conduct of the business, he must have a license.⁵ A statute which requires dealers in drugs to have a license, but per-

Edwards, 105 La. 371, 29 So. 833; State v. State Board, 105 La. 535, 29 So. 989; Munkley v. Hoyt, 179 Mass. 108, 60 N. E. 413; Noel v. People, 187 Ill. 587, 58 N. E. 616, 52 L. R. A. 287; Kentucky Board of Pharmacy v. Lordier, 109 Ky. 119, 58 S. W. 531, 22 Ky. L. Rep. 621; People v. Fisher, 83 Ill. App. 114; Suffolk v. Shaw, 21 N. Y. App. Div. 146, 47 N. Y. Supp. 349; State v. Mathews, 81 S. C. 414, 62 S. E. 695, 128 Am. St. 919; State v. Hamlett, 212 Mo. 80, 110 S. W. 1082; Sconyers v. State, 6 Ga. App. 804, 65 S. E. 814; Lewis v. Brennan, 6 Ga. App. 419, 65 S. E. 189; State Board of Pharmacy v. Matthews, 197 N. Y. 353, 90 N. E. 966, affirming 122 N. Y. App. 889, 106 N. Y. Supp. 1146; State v. Donaldson, 41 Minn. 74, 42 N. W. 781; People v. Routney, 51 Hun 640, 4 N. Y. Supp. 235, 6 N. Y. Cr. Rep. 249; State v. Enoch, 26 W. Va. 253; Braniff v. Weaver, 72 Iowa 641, 34 N. W. 456; State Board of Pharmacy v. White, 84 Ky. 626, 2 S. W. 225, 8 Ky. L. Rep. 678; State v. Forcier, 65 N. H. 42, 17 Atl. 577; Carberry v. People, 39 Ill. App. 506; State v. Robinson, 55 Minn. 169, 56 N. W. 594; Plaisted v.

Walker, 77 Me. 459, 1 Atl. 356; Haas v. People, 27 Ill. App. 416; Cook v. People, 125 Ill. 278, 17 N. E. 849; People v. Nedraw, 16 Bradw. (Ill.), 192; Taliaferro v. Moffett, 54 Ga. 150; In re Jager, 29 S. C. 438, 7 S. E. 605; State v. Holmes, 28 La. Ann. 765, 26 Am. Rep. 110; Tulloss v. Sedan, 31 Kan. 165, 1 Pac. 285; Commonwealth v. Johnson, 144 Pa. St. 377, 24 Atl. 703; Commonwealth v. Fuller, 2 Walk. (Pa.) 550; State v. Sayman, 61 Mo. App. 244, 1 Mo. App. Rep. 366; People v. Moorman, 86 Mich. 433, 49 N. W. 263; State v. Kumpfert, 115 La. 950, 40 So. 365; Green v. State, 49 Tex. Cr. App. 380, 92 S. W. 847; Monnier v. Godbold, 116 La. 165, 40 So. 604; Westchester County v. Dresser, 23 N. Y. App. Div. 215, 48 N. Y. Supp. 953.

² State v. Hall, 10 La. 290, 33 So. 318; State v. Edwards, 105 La. 371, 29 So. 893.

³ In re Jager, 29 S. C. 438, 7 S. E. 605.

⁴ Sconyers v. State, 6 Ga. App. 804, 65 S. E. 814; Commonwealth v. Havius, 119 Ky. 491, 66 S. W. 3, 23 Ky. L. Rep. 1724.

⁵ State v. Forcier, 65 N. H. 42, 17 Atl. 577.

mits practicing physicians to fill their own prescriptions. does not authorize him to fill the prescriptions of other physicians.⁶ But a statute making it unlawful for an unlicensed pharmacist to practice pharmacy or expose for sale at retail any drugs, unless the business is conducted by a licensed pharmacist, and excepting the widow or administrator of a registered pharmacist, and permitting dealers in general merchandise to sell drugs without employing a licensed pharmacist, is unconstitutional, the discriminations not being based on sufficient grounds.⁷ So a statute may authorize the revocation of a pharmacist's license for some offense he may commit against the pharmacy or other law.⁸ In a prosecution for keeping a pharmacy without a license, it is no defense that there was no board for examination and registration, where the defendant could have compelled the appointment of a board.⁹ In a prosecution for carrying on business as a druggist without a license, the burden of justifying or proving a license is on the defendant.¹⁰

⁶ *Suffolk County v. Shaw*, 21 N. Y. App. Div. 146, 47 N. Y. Supp. 349.

⁷ *State v. Abraham*, 78 Vt. 53, 61 Atl. 766.

⁸ *Hildreth v. Crawford*, 65 Iowa 339, 21 N. W. 667; *State v. Crawford*, 73 Iowa 676, 35 N. W. 920.

⁹ *People v. Rontey*, 51 Hun 640, 4 N. Y. Supp. 235, 6 N. Y. Cr. Rep. 249; *Munkley v. Hoyt*, 179 Mass. 108, 60 N. E. 413.

¹⁰ *State v. Horner*, 52 W. Va. 373, 43 S. E. 89; *People v. Rontey*, 51 Hun 640, 4 N. Y. Supp. 235, 6 N. Y. Cr. Rep. 249; *People v. Nedraw*, 16 Bradw. (Ill.) 192.

In Illinois it has been decided that where a pharmacist pays his license fee, he is entitled to proceed in his business, and can not be held liable in a criminal prosecution

because of the non-action of the board of pharmacy in issuing a certificate. *Carberry v. People*, 39 Ill. App. 506.

In Minnesota where a statute made it a finable offense to vend drugs, medicines and poisons in a store except under the supervision of a registered pharmacist, or by a registered assistant, the owner of a drug store was held not liable for a sale made by one in his employ, not a pharmacist or assistant, made without his knowledge and assent. *State v. Robinson*, 55 Minn. 169, 56 N. W. 594. But see *Haas v. People*, 27 Ill. App. 416.

When patented or proprietary medicines may be sold without a license. *Kentucky Board of Pharmacy v. Cassidy*, 115 Ky. 690, 74 S. W. 730, 25 Ky. L. Rep. 102.

§ 618c. What is a Drug.

It is often difficult to determine what is a "drug," and to differentiate it from food. An English statute declares that "the term 'drug' shall include medicine for internal or external use."¹ Under this statute it has been held that beeswax, although used in the preparation of medicine, is not a drug.² And a like holding was made with reference to a sale of arsenical soap containing no arsenic.³ But chewing gum is neither a drug nor an article of food.⁴ Cream of tartar is a drug within the meaning of the New York Statute.⁵ A sale of borax for other than medicinal purposes is not within the provisions of a statute regulating the sale of articles commonly used as "medicines or poisons."⁶ Where a statute permits a sale of "domestic remedies" without being a registered pharmacist, the question whether iodine and quinine are such remedies is one for the jury. A drug, though prepared by skilled chemists and scientific apparatus, may come into such common use, and be so well understood by the people without medical knowledge, as to make it a domestic remedy.⁷ Under an Illinois statute providing that it shall not interfere with "the sale of the usual domestic remedies by retail dealers," quinine is not a "domestic remedy."⁸ A "condiment" is a food and not a medicine.⁹ A manufacturer who designates an article made by him as a food is estopped

When a prescription is necessary. *Fowler v. Randall*, 99 Mo. App. 407, 73 S. W. 931.

A drug store is not a place of "accommodation or announcement." *Cecil v. Green*, 161 Ill. 265, 43 N. E. 1105, 32 L. R. A. 566, affirming 60 Ill. App. 61.

¹ 38 and 39 Vict., ch. 63, § 2.

² *Fowle v. Fowle*, 60 J. P. 758, 75 L. T. 514, 18 Cox 462.

³ *Houghton v. Toplin*, 13 T. L. R. 386.

⁴ *Bennett v. Tyler*, 64 J. P. 119; *Shortt v. Smith*, 59 J. P. 213.

⁵ *State Board of Pharmacy v. Gasau*, 122 N. Y. App. Div. 803, 107 N. Y. Supp. 409.

⁶ *State v. Donaldson*, 41 Minn. 74, 42 N. W. 781.

⁷ *People v. Fisher*, 83 Ill. App. 114.

⁸ *Cook v. People*, 125 Ill. 278, 17 N. E. 845.

Whether a statute included "boiled linseed oil" or not, after its amendment, see *State v. Williams*, 93 Minn. 155, 100 N. W. 641.

⁹ *Savage v. Scovell*, 171 Fed. 566.

to deny that it is such within the meaning of a statute regulating the sale of food.¹⁰

§ 618d. Proprietary Medicine—Original Packages.

Statutes regulating the sale of drugs not infrequently permit the sale of proprietary medicines in the original packages. The words "original packages" in such instances apply to medicines in the original packages of the manufacturer.¹ It will not be presumed that the Legislature, in enactments relative to the sale of poisons, intended to include well-known proprietary medicines containing so little poison that the effects are beneficial rather than injurious.²

§ 618e. United States Pharmacopoeia.

Where a statute requires a drug to be of the standard of the United States Pharmacopoeia, the reference is to the edition of the Pharmacopoeia in use at the time the statute was enacted, and not to one when the sale alleged to be illegal was made.¹ A statute provided that all pharmaceutical preparations sold in a pharmacy should be of a standard quality established by the United States Pharmacopoeia, and that every proprietor of a drugstore or other place where "drugs, medicines or chemicals" were sold should be responsible for the quality of such "drugs, chemicals or medicines." Another section provided that these provisions should not apply to the sale by merchants of cream of tartar and other enumerated articles, except as therein provided. It was held that the enumerated articles not sold as drugs or medicines need not conform to the standard prescribed by the Pharmacopoeia for medicinal preparations, though the seller of such articles, if adulterated, might be subject to other statutory

¹⁰ *Savage v. Scovell*, 171 Fed. 566, "International Stock Food."

¹ *People v. Abraham*, 16 N. Y. App. Div. 58, 44 N. Y. Supp. 1077.

² *State v. Marvin*, 5 Ohio S. & C. P. Dec. 593, 7 Ohio Dec. 204, 5 Ohio N. P. 209.

Evidence to that effect was held admissible.

¹ *State v. Emery*, 55 Ohio St. 364, 45 N. E. 319. See *State Board of Pharmacy v. Bronson* (N. Y. App.), 113 N. Y. Supp. 490.

penalties, the word "chemicals" in the statute being limited to chemicals used as medicines or drugs.² An affidavit charging a defendant with having for sale a drug which "differed from the standard of strength laid down in the United States Pharmacopoeia," without stating whether such drug was below or above the strength, and which of the constituent elements of such drug so differed, is insufficient because of its indefiniteness.³

² *State Board of Pharmacy v. affirmed* 52 N. Y. Misc. Rep. 490, Gasau, 195 N. Y. 197, 88 N. E. 102 N. Y. Supp. 539.
³ 55, reversing 122 N. Y. App. Div. *Groenland v. State*, 6 Ohio Dec. 803, 107 N. Y. Supp. 409, which 313, 4 Ohio N. P. 122.

CHAPTER XIX.

MISCELLANEOUS.

SEC.

618f. Adulteration.

618g. Unavoidably mixed.

618h. Sale of inferior article.

SEC.

618i. Short weight.

618j. Cases of adulterated vinegar.

§ 618f. Adulteration.

The word "adulteration" in the Michigan statute¹ declaring it unlawful to manufacture and sell maple syrup that is in anywise adulterated with common sugar or any other foreign substance, means the mixture of any foreign substance, wholesome or unwholesome, mixed with maple syrup.² If a statute defines adulteration as the putting in food a foreign substance, it is no defense that the substance put in it was harmless.³ Thus, though coal-tar dye is harmless, its use in vanilla extract, making it appear stronger than it really is, is a violation of a statute prohibiting the adulteration of food by coloring, whereby inferiority is concealed and it is made to appear better than it is.⁴ As a rule the pure food laws are not intended to prevent manufacturers of articles of food

¹ Comp. Laws, § 5007.

² *Pierce Viaus Maple Co. v. Bird*, 154 Mich. 73, 117 N. W. 553.

³ *Commonwealth v. Schaffner*, 145 Mass. 512, 16 N. E. 280; *St. Louis v. Wortman*, 213 Mo. 131, 112 S. W. 520; *Commonwealth v. Dougherty*, 39 Pa. Super. Ct. Rep. 338; *Commonwealth v. Kevin*, 18 Pa. Super. Ct. Rep. 414; *People v. Hinshaw*, 135 Mich. 378, 97 N. W. 758, 10 Detroit Leg. N. 794; *State v. Haynes*, 7 Ohio N. P. 624, 8 Ohio S. & C. P. Dec. 678.

⁴ *People v. Hinshaw*, 135 Mich. 378, 97 N. W. 758, 10 Detroit Leg. N. 794.

A statute may be so framed as to require the substance added to be poisonous to constitute the act of adding it to food an adulteration. *People v. Bischoff*, 14 N. Y. St. Rep. 581.

So a statute may be so limited as to apply only to an adulteration of food and not to drinks. *Commonwealth v. Kebort*, 212 Pa. 289, 61 Atl. 895.

from improving it, so long as no infringement of the law or spirit of the Act defining adulteration takes place.⁵ Where a statute provided that "an article of food shall be deemed to be adulterated if any valuable or necessary constituent or ingredient has wholly or in part been abstracted from it," it was held that the product left after the oil had been extracted from the cocoa bean was not an adulterated article within the meaning of the statute, where it was shown that the abstraction of the oil was necessary to render the article marketable.⁶ To put salicylic acid in any quantity in beer is an adulteration of the beer, if it be shown to be poisonous or deleterious to health.⁷

§ 618g. Unavoidably Mixed.

A statute made it an offense for any person to "sell to the prejudice of the purchaser any article of food or any drug which is not of the nature, substance and quality of the article demanded by such purchaser," but made an exception "where the food or drug is unavoidably mixed with some extraneous matter in the process of collection or preparation."¹ Under this statute, to prevent unavoidable mixture, reasonable care must be used. When the foreign ingredient is present in larger proportion than is ordinarily found in a commercial article, the practice is to regard the excessive quantity present as an adulteration; for instance, in the case of pepper, where sand is in excess. In an instance of caper tea, it was held that owing to the method in which caper tea is produced, the presence of 3.5 percent of mineral matter in the tea did not constitute an adulteration, and that the seller

⁵ *People v. Jennings*, 132 Mich. 662, 94 N. W. 216, 10 Detroit Leg. N. 39. See also *Commonwealth v. Dougherty*, 39 Pa. Super. Ct. Rep. 338.

⁶ *Rose v. State*, 11 Ohio Cir. Ct. Rep. 87, 1 Ohio C. D. 72, reversing 2 Ohio N. P. 270, 1 Ohio C. D. 44. Such a product is not a compound or mixture.

To offer for sale, as an article of food, liquid chicory and coffee as "liquid coffee," is an offense under this same statute. *State v. Dreher*, 55 Ohio St. 115, 44 N. E. 510.

⁷ *State v. Hutchinson*, 55 Ohio St. 573, 45 N. E. 1043.

¹ 38 and 39 Viet., ch. 63, § 6.

was protected under this exception in the statute.² In a case of selling buttermilk adulterated with 30 percent of added water, it was proved that the addition of some water was necessary in the process of manufacture, but that the quantity varied, and depended for the most part upon the state of the temperature. The defendant was held not guilty.³

§ 618h. Sale of an Inferior Article for Lemonade.

A statute forbade the manufacture of adulterated beverages, and the sale of any inferior or cheaper substance in imitation of, or under the name of, another article. A dealer, where this statute was in force, sold a mixture of 48 percent sugar, 35 percent tartaric acid, 12 percent citric acid, and 5 percent oil of lemon as "Eiffel Tower Lemonade." On the box were pictures of lemons, and each box contained a circular, which stated that thirty-eight millions of lemons were used during the past year in manufacturing this kind of lemonade, and that it was manufactured by concentrating the lemons in the orchards where they were grown. The dealer testified that the oil of lemon was made from lemon rind, and that during the past year fifty-two millions of lemons were used in manufacturing such lemonade. It was shown that tartaric acid was much cheaper than lemon juice. It was held that the evidence justified a verdict of guilty of selling an inferior article as lemonade.¹

§ 618i. Short Weight.

Defendant cured hams and sides of bacon at its packing house, and to preserve them a part of them were wrapped with cloth and paper and correctly branded, and then shipped to another State, where a ham and side of bacon were

² Shortt v. Robinson, 63 J. P. 295, 68 L. J. Q. B. 352, 80 L. T. 261, 19 Cox C. C. 243.

³ Warnock v. Johnstone, 8 Rettie (J. C.) 55, 4 Coup. 509. See also Bosomworth v. Bridge, 36 Sol. J.

594, and Goulder v. Rook [1901], 2 K. B. 290, 65 J. P. 646, 70 L. J. K. B. 747, 84 L. T. 719, 49 W. R. 684.

¹ People v. Park, 60 N. Y. App. Div. 255, 69 N. Y. Supp. 1120.

sold by a distributing agent at their gross weight, and were purchased in that form by the purchaser in preference to purchasing unwrapped meats, which were also on sale at the same place and for the same price. It was held that this sale was not a violation of the statute requiring the weight to be stated on the outside of the package, because it had not been put up by the retailer.¹

§ 618j. Cases on Adulterated Vinegar.

One section of a statute required cider vinegar to contain $1\frac{3}{4}$ percent of cider vinegar solids on evaporation at boiling temperature. Another section required fermented vinegars to contain $1\frac{3}{4}$ percent of solids of the fruit or grain from which they were made, and a stated percent of ash or mineral matter, the product of the fruit from which it was made. It was held that cider vinegar must contain the required quantity of ash or mineral matter, as well as the stated percent of cider vinegar solids.¹ One convicted of violating a statute prohibiting the sale of vinegars that will not stand a specified test, is not deprived of property without due process of law, because he could not obtain a sample of the vinegar in question for analysis, where no one connected with the prosecution prevented him from obtaining one, since the prosecutor is not required to furnish the accused a sample.² A statute provided that vinegar which contained any artificial coloring matter should be deemed adulterated, and prohibited any person manufacturing, keeping for sale, or offering for sale, any adulterated vinegar, or any vinegar or product in imitation of cider vinegar which was not cider vinegar. The defendants manufactured and sold as cider vinegar a product extracted from cores, skins, and small pieces of apples, all of which had been evaporated and soaked in river water, coloring matter having been added to give it the appearance of cider vinegar. It was held that

¹ State v. Swift & Co., 84 Neb. 244, 120 N. W. 1127.

² People v. Worden Grocer Co., 118 Mich. 604, 77 N. W. 315.

² People v. Worden Grocer Co., *supra*.

they had violated this statute.³ In the manufacture of such vinegar water can not be introduced. In defining "cider vinegar" as vinegar made exclusively from "pure" apple juice, the word "pure" means "free from mixture or contact with that which is deleterious, inferior, vitiating or polluting," and water can not be added to the product.⁴ Where, in the manufacture of vinegar, low wine, formed from fermented grain, was passed through roasted malt, for the sole purpose of coloring the vinegar, the vinegar was held to contain coloring matter within the prohibition of a statute forbidding the adulteration and artificial coloring of vinegar.⁵

³ *People v. Niagara Fruit Co.*, 75 N. Y. App. Div. 11, 77 N. Y. Supp. 805; affirmed 173 N. Y. 629, 66 N. E. 1114.

⁴ *People v. Heim*, 90 N. Y. App. Div. 408, 86 N. Y. Supp. 141.

Evidence that a sample of cider vinegar had less than two percentum of cider vinegar solids, without showing that this result was arrived at "by full evaporation over boiling water," does not com-

ply with the statutory requirements and, at the least, justifies a refusal to disturb the finding of the jury in the defendant's favor. *People v. Braested*, 30 N. Y. App. Div. 401, 51 N. Y. Supp. 824.

⁵ *Weller v. State*, 53 Ohio St. 77, 40 N. E. 1001, affirming 8 Ohio Cir. Ct. Rep. 467.

See generally *People v. Albion Cider & Vinegar Co.*, 118 N. Y. Supp. 15.

CHAPTER XX.

CIVIL LIABILITY OF VENDOR OF DRUGS AND FOOD.

SEC.

- 619. Degree of care required of druggist.
- 620. Drug not producing injury.
- 621. Accident.
- 622. Manufacturers of drugs, liability to consumer.
- 623. Manufacturers of prepared foods or drugs, liability to consumer—Canned goods.
- 624. Patented medicines.
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- 626. Druggist's liability in selling unbroken packages — Negligence basis of liability.
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- 630. Implied representation that drug requested for a particular purpose is fit for such purpose.
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- 632. Drug sold for specific purpose.
- 633. Druggist recommending prescription.
- 634. Chemical mixed after sale with another chemical producing dangerous compound.
- 635. Sale of drug to minor in violation of statute.

SEC.

- 636. Negligently compounding prescription — Illegible prescription.
- 637. Purchaser informed of deadly character of drug.
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- 639. Plaintiff without consent of defendant taking by mistake dangerous drug from properly labeled vessel.
- 640. Prima facie showing of negligence in sale of drug.
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- 643. Negligence in treatment of injured person.
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- 648. Eating unwholesome food in a restaurant — Proof of negligence.
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- 650. Sale of food under false description.
- 651. Unwholesome supply of water.
- 652. Food for cattle and horses.
- 653. Slander.
- 654. Recovering purchase price on sale of impure food.
- 655. Liability for price of adulterated food sold as pure food.

§ 619. Degree of Care Required of Druggist.

"The highest degree of care known to practical men must be used to prevent injuries from the use of drugs and poisons. It is for this reason that a druggist is held to a special degree of responsibility. The care required must be commensurate with the danger involved; the skill employed must correspond with that superior knowledge of the business which the law requires."¹ It is error to charge the jury that the druggist and the purchaser were under the same degree of care in furnishing and taking the drug, for the druggist is under the highest degree of care for the safety of the public dealing with him, and the purchaser is only bound to exercise ordinary care for his own safety.² Druggists must know the properties of the medicines they sell, and must employ such persons as are capable of discriminating when dealing out medicines called for, and it is not error to so charge the jury.³

§ 620. Drug Not Producing Injury.

If the drug improperly or negligently sold did not produce ill effects, then there can be no recovery, unless it be the case paid for the article. Thus it has been held error to reverse to charge the jury to the effect that, if the medicine was not the proximate cause of, or if the plaintiff was ill at

Lowes v. Rose, 13 Ind. App. 42, N. E. 303; *Walton v. Manchester*, 6 N. Y. 397, 57 Am. Dec. 55; *Peters v. Johnson*, 50 W. Va. 44, 41 S. E. 190, 57 L. R. 1; *Knoefel v. Atkins*, 40 Ind. 128, 81 N. E. 600; *Butterfield v. Smellenburg* (Pa.), 79 Atl.

666, 4 West. L. Mon. 488; *Fleet v. Hollenkamp*, 13 B. Mon. 219, 56 Am. Dec. 563.

Where the charge is selling a poison by mistake for a medicine, evidence is not admissible that the defendant druggist was a careful and prudent man in handling medicines and poisons. *Hall v. Rankin*, 87 Iowa 261, 54 N. W. 217.

ton v. Wood (Ky.), 85 S. 27, Ky. L. Rep. 412.
th v. Hayes, 23 Ill. Rep. 117.
err v. Clason, 2 Ohio Dec.

Damages for permanent physical weakness may be recovered. *Butterfield v. Smellenburg* (Pa.), 79 Atl. 980.

the time, the taking the drug did not increase his illness, the plaintiff was not entitled to recover.¹

§ 621. Accident.

As the basis of the action against a druggist for furnishing the wrong kind of a drug is negligence, yet if it was furnished through a mere accident, devoid of any negligence, he will not be liable for the damages occasioned by his accidental act. But his mistake should be submitted to the jury as a matter of evidence on the question of negligence, and not as establishing the accident.¹ Unless negligence exists in such an instance, no liability attaches.² Thus, when a jug filled with sulphuric acid was on a shelf in a creamery, where there were some similar jugs containing buttermilk, and a customer asked an employe of the proprietor for permission to take a drink of buttermilk, and he drank from the jug filled with the sulphuric acid, to his injury, it was held that the direction to him to drink out of the jug was not of itself negligence, it not appearing that the one who gave him the permission knew that he had in mind the jug containing the acid, or that he even knew there was a jug containing acid.³ But where a druggist, who had been requested to compound a certain medicine ground the different articles of which it was composed in a mill used to grind poisonous drugs, without properly cleaning the mill, it was held that he was liable for the injuries the person taking the medicine thus compounded sustained, and that the transaction could not be classed as a mere accident. The court refused to apply the rule as to the degree of care and diligence necessary to except a party from liability.⁴ In another case a prescrip-

¹ Rabe v. Sommerbeck, 94 Iowa 656, 63 N. W. 458.

² Brown v. Marshall, 47 Mich. 576, 41 Am. Rep. 728, 11 N. W. 392; Beckwith v. Oatman, 43 Hun 265; Knoefel v. Atkins, 40 Ind. App. 428, 81 N. E. 600.

³ Beckwith v. Oatman, 43 Hun

265; Antoine v. Duncombe, 8 Ont. Wkly. Rep. 719.

⁴ Burk v. Creamery Package Mfg. Co., 126 Iowa 730, 102 N. W. 793, 106 Am. St. 377.

⁵ Fleet v. Kollenkamp, 13 B. Mon. 219, 56 Am. Dec. 563.

tion was for aromatic spirits of ammonia. The complaint charged that the defendant negligently prepared and compounded a "dangerous, poisonous, corrosive and burning liquid mixture." It was held that the negligence charged was proven by evidence showing that the dose produced the injury complained of because not sufficiently diluted, without evidence that it was compounded of other ingredients than those ordered.⁵

§ 622. Manufacturer of Drugs, Liability to Consumer.

The leading case in America upon the liability of a manufacturer of drugs to the ultimate consumer who is injured by their use is an early one in New York, in which the manufacturer was held liable. In that case a dose of dandelion was prescribed for a person who was at the time ill. The prescription was presented at the drugstore of one Dr. Foord, and the medicine obtained, which was administered to the person for whom it was prescribed, and great suffering resulted from its use. It was afterwards ascertained that the drug was belladonna, and not dandelion. The drug was taken from a jar prepared by the defendant, a manufacturer-chemist, and which had been by him labeled as extract of dandelion. The defendant sold the jar and its contents to one Aspinwall, a wholesale dealer in drugs, by whom it was sold to Dr. Foord, the retail dealer, from whom the plaintiff purchased it. The court adjudged the defendant liable. An English case is in line with this American case. In that case the declaration alleged that the defendant carried on the business of a chemist, and in the course of his business he used to sell a chemical compound, made of ingredients known only to him, and by him represented to be fit to be used for a hair wash; and the plaintiff J. G. therefore bought from the defendant a bottle of this hair wash, to be used by him, the plaintiff E. G., as the defendant then knew, and

Field v. Smellenburg Atl. 980. *Curtin v. Somerset*, 140 Pa. 70, 21 Atl. 244, 23 Am. St. 220, 10 L. R. A. 322.

Is v. Winchester, 6 N. Y. n. Dec. 455. Approved in

averred that the defendant had negligently and unskillfully prepared the hair wash so that, by reason thereof, it was unfit to be used for washing the hair, whereby the female plaintiff, who used it for that purpose, was injured. It was held by the Court of Exchequer on demurrer that a good cause of action was disclosed.²

§ 623. Manufacturer of Prepared Food or Drugs, Liability to Consumer—Canned Goods.

There is not uniformity in the cases upon the question of liability of one who puts a food upon the market which is poisonous or unwholesome, and which, after passing through several dealer's hands, injures the person who consumes it. A notable case is an instance of canned meats which injured the person eating it. This was meat put up by one of the leading meat packers of the world, and it was put upon the market in the usual way, and passed through a dealer's possession before it reached the consumer. In the declaration it was set forth, in substance, that the defendant was engaged in the business of putting up in tin cans or vessels, and vending meats or ham for food and domestic use, and that he put up a certain can of ham for food and domestic use which was sold by the defendant to a retail dealer to be sold to consumers and patrons; that plaintiff purchased a can of such ham from this retail dealer for food and domestic use; that the defendant "so carelessly, negligently, recklessly, and improperly put up, in said can of ham, diseased, unfit and unwholesome pork or ham, which was deleterious and poisonous to the human body and health; that the plaintiff, after purchasing said can of ham, and without fault or negligence on her part, ate a piece of ham taken from said can, and, in consequence thereof, became poisoned and sick with ptomaine poison." This was held sufficient to show that the defendant was liable. The court assumed, without deciding, that there was no implied warranty on the part of the manufacturer of canned goods that the goods were wholesome and

² George v. Skivington, 5 Exch. 1.

fit to be eaten, and then said: "It by no means follows from this that there is no duty resting upon the manufacturers to exercise care that the contents of the cans, which he puts upon the market to be sold for food and domestic use, are, in fact, food, rather than poison." After reviewing a number of cases, none of them exactly in point, the court proceeds as follows: "Coming, then, to consider the facts of the present case as averred in the declaration, and dealing with them, irrespective of the presence or absence of contractual obligations arising out of the dealings between manufacturer and retailer and between retailer and consumer, the question is, whether the manufacturer is under a duty to him who, in the ordinary course of trade, becomes the ultimate consumer, to exercise care that the goods which he puts into cans and sells to retail dealers, to the end that such dealers may sell the same to customers and patrons as food, are wholesome and fit for food, and not tainted with poison. Sealed goods are, at the present day, in such common use that we may judicially recognize that the contents are sealed and not open to the inspection or test either of the retailer or the customer, until they are opened for use, and not susceptible to practical test, except the test of eating. When the manufacturer puts the goods upon the market in any form for sale and consumption he, in effect, represents to the purchaser that the contents of the can are suited to the purpose for which it is sold, the same as if an express representation to that effect were printed upon a label. Under these circumstances the fundamental condition upon which the common law of caveat emptor is based—that the purchaser should 'look out for himself'—is conspicuously absent, and there is no opportunity to look out for himself. And when the consumer buys and eats the contents of the package, relying upon the assurance of the manufacturer that they are fit to eat, it seems to us to result from general and fundamental principles that he has a right to insist that the manufacturer shall at least exercise care that they are so fit, and not unwholesome and poisonous." "Upon both reason and equity, we are clearly of the opinion that the declara-

tion before us sets up a good cause of action. The fact that the defendant was the manufacturer, presumably having knowledge, or opportunity for knowledge, of the contents of the cans and of the process of manufacture; that it put the goods upon the market for sale by dealers to consumers under circumstances such that neither dealer nor consumer had opportunity for knowledge of the contents; the fact that the goods were thus manufactured and marketed under circumstances that imported a representation to intending purchasers that they were fit for food and beneficial to the human body; that, in the ordinary course of business, there was a probability (it being, indeed, the very purpose of the defendant) that the goods should be purchased, and used by parties purchasing in reliance upon the representation, and that the defendant negligently prepared the food so that it was unwholesome and unfit to be eaten, and poisonous to the human body, whereby the plaintiff was injured, makes a case that renders the defendant liable for the damages sustained by the plaintiff thereby."¹ In an Illinois case the declara-

¹ *Tomlinson v. Armour & Co.*, 75 N. J. L. 748, 70 Atl. 314, 19 L. R. A. (N. S.) 923.

The court reviews *Marvin Safe Co. v. Ward*, 46 N. J. L. 19; *Styles v. F. R. Long Co.*, 67 N. J. L. 413, 51 Atl. 710, 70 N. J. L. 301, 57 Atl. 448; *Conklin v. R. P. & J. H. Staats*, 70 N. J. L. 773, 59 Atl. 144, 66 L. R. A. 595; *Thomas v. Winchester*, 6 N. Y. 397, 57 Am. Dec. 455; *Langridge v. Levy*, 2 Mees. & W. 519, 4 Mees. & W. 337; *Van Winkle v. American Steam Boiler Co.*, 52 N. J. L. 240, 19 Atl. 472; *Appleby v. State*, 45 N. J. L. 161; *Brennan v. United Hatters*, 73 N. J. L. 729, 65 Atl. 165, 118 Am. St. 727, 9 L. R. A. (N. S.) 254, 118 Am. St. 727, 9 A. & E. Ann. Cas. 727; *Delaware, L. & W. R. Co. v. Solnan*, 39 N. J. L.

299, 23 Am. Rep. 214; *Norton v. Sewall*, 106 Mass. 143, 8 Am. Rep. 298; *Bishop v. Webber*, 139 Mass. 411, 52 Am. Rep. 715, 1 N. E. 154; *Blood Balm Co. v. Cooper*, 83 Ga. 457, 10 S. E. 118, 5 L. R. A. 612, 20 Am. St. 324; *Schubert v. J. R. Clark Co.*, 49 Minn. 331, 51 N. W. 1103, 15 L. R. A. 818, 32 Am. St. 559; *Croft v. Parker W. & Co.*, 96 Mich. 245, 55 N. W. 812, 21 L. R. A. 139; *Huset v. J. I. Case Threshing Co.*, 57 C. C. A. 237, 120 Fed. 865, 61 L. R. A. 303, and *Salmon v. Libby, McNeill & Libby*, 219 Ill. 421, 76 N. E. 573; *Cunningham v. C. R. Peace House Furnishing Co.*, 74 N. H. 435, 6 Atl. 120, 20 L. R. A. (N. S.) 236 (stove polish exploding and injuring members of the family of the purchaser). Only a few of these cases

tion alleged, in substance, that the defendant prepared, put up in packages, and sold to the trade certain mince meat, which, in the due course of business, passed through the hands of a wholesaler, a retail dealer, and finally was made into a pie, after eating of which plaintiff's testator died; that the defendant negligently and improperly prepared and manufactured the mince meat in question; that as a result the same became unfit for food, and poisonous and destructive to human life when used as food; and that plaintiff's testator, lawfully partaking of the same, was poisoned, and lost his life in consequence thereof. There was no averment of a scienter, the declaration counting upon the negligence alone. It was held that this set forth a good cause of action, under a statute permitting a recovery for the death of a person caused by the wrongful act or omission of another.² In another case a vendor of spoiled bacon was held liable. He had sold the meat to the plaintiff's butcher, and the court held, if the vendor was negligent in selling meats that were dangerous to those who ate them, he would be liable for the consequences of his act if he knew the meats to be dangerous or by proper care on his part could have known their condition.³ In a Massachusetts case occurs a dictum to the effect that a caterer who furnished improper and unwholesome food, by which the guests of his customers were made ill, would be liable to such guests, though he had no direct actual connection with them.⁴ This dictum was followed with authority in a subsequent case.⁵ But in an Arkansas

case, *Mesh-
v. Channellene Oil & Mfg.
Co.*, 119 N. W. 428,
10 Minn. 104, 119 N. W. 428,
10 St. 441; *Barney v. Bur-
er*, 7 Lans 224. See *Car-
arden*, 78 Me. 528.
on v. Libby, McNeil &
19 Ill. 421, 76 N. E. 573.
tion of the liability of a
persons not in privity
with him was not dis-
the specific objection to
action was that it failed
E FOOD—51.

to state the particular negligence complained of.

² *Craft v. Parker W. & Co.*, 96 Mich. 245, 55 N. W. 812, 21 L. R. A. 139. But the court refrained from any discussion of the question of the manufacturer's liability to third persons.

⁴ *Bishop v. Weber*, 139 Mass. 411, 1 N. E. 154, 52 Am. Rep. 715.

⁵ *Lebourdais v. Vitriified Wheel Co.*, 194 Mass. 341, 80 N. E. 482.

case a recovery was refused to a purchaser from a retailer of canned meat against the packer of it, upon the ground that, as the goods were purchased from a middleman, there was no privity of contract between the consumer and the packer, and that, therefore, no warranty of wholesomeness passed with the property from the packer to the consumer through the latter's vendor. The question of the purchaser's liability for negligence in the preparation of the food was altogether ignored by the court, though the complaint contained an averment of such negligence.⁶ In the Massachusetts case already cited, the court said: "The liability does not rest so much upon an implied contract as upon a violated or neglected duty voluntarily assumed. Indeed, when the guests are entertained without pay, it would be hard to establish an implied contract with each individual. The duty, however, arises from the relation of the caterer to the guests. The latter have a right to assume that he will furnish for their consumption provisions which are not unwholesome and injurious through any neglect on his part. The furnishing of provisions which endanger human life or health stands upon the same ground as the administering of improper medicines, from which a liability springs, irrespective of any question of privity of contract between the parties."⁷ The same rule has been applied to a sale of a drug which turned out to be a poison, and which a person not a party to the contract of purchase took, to his injury.⁸ So where a druggist, at the request of a purchaser, put some croton oil on candy that had been purchased from him, knowing, or having cause to believe, that the purchaser intended to use the candy as a trick, he was held liable to a criminal prosecution for assault and battery.⁹ What has been said is

⁶ *Nelson v. Armour Packing Co.*, 76 Ark. 352, 90 S. W. 288, 6 A. & E. Ann. Cas. 237; *Davidson v. Nichols*, 11 Allen 514.

⁷ *Bishop v. Weber*, *supra*.

⁸ *Peters v. Johnson*, 50 W. Va. 644, 41 S. E. 190, 57 L. R. A. 428, 88 Am. St. 909; *Quinn v.*

Moore, 15 N. Y. 432; *Willson v. Faxon*, 63 N. Y. App. 561, 117 N. Y. Supp. 361. See also *Minner v. Scherpich*, 5 N. Y. St. Rep. 851; *Blood Balm Co. v. Cooper*, 83 Ga. 457, 10 S. E. 118, 5 L. R. A. 612, 20 Am. St. 324.

⁹ *State v. Moore*, 121 N. C. 677.

especially true as to instances of a sale to a husband where he purchases it for his wife¹⁰ or a master who procures medicine for his servant.¹¹

28 S. E. 547, 43 L. R. A. 861, 61 Am. St. 686.

"The manufacturer or dealer who puts out, sells, and delivers, without notice to others of its dangerous qualities, an article which invites a certain use, and which article is not inherently dangerous, but which, by reason of negligent construction, he knows to be imminently dangerous to life or limb, is manifestly and not apparently dangerous when used as it is intended to be used, is liable to any person who suffers an injury therefrom, which injury might have been reasonably anticipated. So a manufacturer or vendor putting out and selling articles inherently dangerous, such as explosions or poisons, without notice to others of their dangerous nature or quality or with a misleading notice, or otherwise in any other way, is liable for any injury to any third person which might have been reasonably foreseen by the manufacturer or dealer in the exercise of ordinary care. So a manufacturer or dealer making and selling an article intended to preserve or affirm human life is liable to third persons who sustain injury caused by negligence in preparing, packaging, labeling, or directing the use of such articles, if such injury might have been reasonably foreseen in the exercise of ordinary care. The reason for this is apparent. The manufacturer or vendor should have

no immunity from duties common to all, merely because he is a manufacturer or vendor. At the same time, there is in the common law no authority for imposing special duties upon him by reason of any privity between him and the vendee of his vendee, except in the instances mentioned, which may be regarded as occasions of a general duty toward the public to whom the wares are offered, or as exceptions to the rule of non-liability. If a general rule of statute or common law requires him to take precautions to protect the public against a dangerous substance by proper designation of the thing manufactured or sold, he owes a duty to the public so to do, and for failure in that regard he is liable for the consequences reasonably to be anticipated." *Hasbrook v. Armour & Co.* (Wis.), 112 N. W. 157, 23 L. R. A. (N. S.) 876. Consequently it was held that a manufacturer who sells to the trade is not liable in tort for an injury to a consumer by a needle which is in some way imbedded in a cake of soap without his knowledge, which cake is sold with others in the usual way to the dealer; and it is immaterial that purity of the product was guaranteed. Nor is the retailer liable.

¹⁰ *Davis v. Guanieri*, 34 La. Ann. 913.

¹¹ *Norton v. Sewall*, 106 Mass. 143, 8 Am. Rep. 298.

§ 624. Patented Medicines.

In an early English case there is an instruction that if a druggist sold a compound, not knowing for whom it was intended, he would not be liable to the person who, not being the purchaser, used it and was injured.¹ A druggist is not required to analyze the contents of each bottle or package of a patent or proprietary medicine which he gets from a manufacturer. If he delivers it to a customer calling for it with the label of the proprietor or patentee on it, he is not negligent.² But the maker of the patented medicine is liable to any one who purchases and uses it in ignorance of its poisonous character.³

§ 625. Prescription Placed upon Patent Medicine.

Where a prescription is placed upon a patented medicine, giving the amount of the medicine that should be taken at a dose, then any one following the directions, to his injury, may maintain an action against the manufacturer, though the medicine has passed through the hands of several dealers between him and such manufacturer. This question has been discussed by the Supreme Court of Georgia. The medicine there involved was a patented article put up in a bottle upon which was a prescription. "The liability of the plaintiff in error," said Justice Blandford, speaking for the court, "to the person injured arises, not by contract, but for a wrong committed by the proprietor in the prescription and directions as to the dose that should be taken. We can see no difference whether the medicine was directly sold to the defendant in error by the proprietor or by an intermediate party to whom the proprietor had sold it in the first instance for the purpose of being sold again. It was put upon the market by the proprietor, not alone for the use of druggists to whom they might sell it, but to be used by the public in general, who might need the same for the cure of certain dis-

¹ George v. Skivington, 5 Exch. 1.

² West v. Emanuel, 198 Pa. 180,
47 Atl. 965.

³ Blood Balm Co. v. Cooper, 83
Ga. 457, 10 S. E. 118, 5 L. R. A.
612, 20 Am. St. 324.

eases, for which the proprietor set forth in his label the same was adapted. This was the same thing as if the proprietor himself had sold this medicine to the defendant in error, with his instructions and directions as to how the same should be taken. In the cases cited by the plaintiff in error there is no case in which the proprietor prescribed the doses and quantities to be taken of the medicine sold by him. If this medicine contained the iodide of potassium in sufficient quantity to produce the injurious consequences complained of to the defendant in error, and if the same was administered to him either by himself or any other person as prescribed in the label accompanying the medicine, he could, in our judgment, recover for any injury he may have sustained on account of the poisonous effect thereof. It was wrong on the part of the proprietor to extend to the public generally an invitation to take the medicine in quantities sufficient to injure and damage persons who might take it. A medicine which is known to the public as being dangerous and poisonous if taken in large quantities may be sold by the proprietor to druggists and others, and if any person without more should purchase and take the same so as to cause injury to himself, the proprietor would not be liable. But if the contents of a medicine are concealed from the public generally, and the medicine is prepared by someone who knows its contents, and he sells the same, recommending it for certain diseases, and prescribing the mode in which it shall be taken, and injury is thereby sustained by the person taking the same, the proprietor would be liable for the damages thus sustained. These proprietary or patent medicines are secret, or intended by the proprietors to be secret, as to their contents. They expect to derive a profit from such secrecy. They are, therefore, liable for all injuries sustained by any one who takes their medicines in such quantities as may be prescribed by them. There is no way for a person who uses the medicine to ascertain what its contents are, and in this case the contents were only ascertained after an analysis made by a chemist, which would be very inconvenient and expensive to the public; nor would it be the duty of a person

using the medicine to ascertain what poisonous drugs it may contain. He has a right to rely upon the statement and recommendation of the proprietor, printed and published to the world; and if, thus relying, he takes the medicine, and is injured on account of some concealed drug of which he is unaware, the proprietor is not free from fault, and is liable for the injury thereby sustained."¹

**§ 626. Druggists' Liability in Selling Unbroken Packages—
Negligence Basis of Liability.**

Many drugs today are sold in the packages or bottles just as received from manufacturers, and while the manufacturer is a guarantor of their contents as he represents them to be, it is a very different thing with the druggist or retailer. The druggist relies upon the representations made to him by the manufacturers. If he has bought the drug from a reputable manufacturer, either directly or indirectly, under verbal or oral representations of its contents or as to what it is, and he, not knowing differently, sells it in reliance upon such representations, he will not be liable if it turns out to be a different drug, though the use of such drug produce serious injury to the person using it. There must be negligence upon the part of the druggist in the sale of a drug to render him liable, unless he expressly enters into an engagement of warranty. There is no liability in such cases, irrespective of the question of negligence or intentional wrong. Thus, where a druggist's clerk sold sulphate of zinc for epsom salts, Justice Cooley said: "That such an error might occur without fault on the part of the druggist or his clerks is readily supposable. He may have bought his drugs from a reputable dealer, in whose warehouse they may have been tampered with for the purpose of mischief. It is easy to suggest accidents after they come into his own possession, or wrongs by others, of which he would be ignorant, and against which a high degree of care would not give perfect protection. But how the mis-

¹ *Blood Balm Co. v. Cooper*, 83 Ga. 457, 10 S. E. 118, 5 L. R. A. 612, 20 Am. St. 324.

fortune occurs is unimportant if, under all the circumstances, the fact of occurrence is attributable to him as a legal fault. . . . But we do not find that the authorities have gone so far as to dispense with actual negligence as a necessary element in the liability where a mistake has occurred."¹

§ 627. Sale of Drugs from Broken Packages.

Whatever the rule may be with reference to the sale of drugs in the original packages, it is a very different thing where the druggist breaks the package and retails it to the consumer. He then has an opportunity to examine and ascertain what the drug is that he is selling. The label of a harmless drug placed by reputable wholesale dealers on a poisonous drug purchased from them will not protect him from liability, even though he has failed to discover the mistake when handling the drug. Having the opportunity to ascertain the character of the drug sold, the least inattention or want of skill on his part to ascertain its properties or what it will render him liable to a person taking it, to his injury, who has relied upon the tacit representations put forth by the act of sale concerning the properties of the drug requested. "All persons who deal with deadly poisons, noxious and dangerous substances are held to a strict accountability."¹ Thus, where a druggist furnished laudanum instead of rhubarb, and the laudanum was administered to the purchaser as rhubarb, resulting in his death, his administrator was awarded a judgment for damages because of his death.² So a sale of oil of bitter almonds as oil of sweet almonds was held to render the druggist selling it liable for the fatal results produced in taking it;³ so of morphine

¹ Brown v. Marshall, 47 Mich. 576, 41 Am. Rep. 728, 11 N. W. 392.

² Howes v. Rose, 13 Ind. App. 674, 42 N. E. 303; Fleet v. Hollenkemp, 13 B. Mon. 219; Cunningham v. C. R. Pease House-Furnish-

ing Co., 74 N. H. 435, 69 Atl. 120, 20 L. R. A. (N. S.) 236, 124 Am. St. 979.

³ Norton v. Sewall, 106 Mass. 143, 8 Am. Rep. 298.

⁴ Davis v. Guarnieri, 45 Ohio St. 470, 4 Am. St. 548, 15 N. E. 350.

sold as calomel,⁴ and of morphine for quinine;⁵ so in the case of a hair wash prepared at the request of a husband for his wife, which was so negligently and unskilfully prepared that it was unfit to be used for washing the hair.⁶ The use of strychnine for camphor, when filling a prescription, establishes negligence;⁷ or sulphate of zinc for epsom salts;⁸ or belladonna for dandelion;⁹ or tartaric acid for Rochelle salts;¹⁰ or extract of belladonna for extract of dandelion;¹¹ or copperas instead of Glauber's salt;¹² or undiluted aromatic spirits of ammonia that is to be taken internally.¹³

§ 628. Mislabeling Poisons or Medicines—Liability to Remote Purchaser.

"Pharmacists or apothecaries," said the Supreme Court of the United States, "who compound or sell medicines, if they carelessly label a poison as a harmless medicine and send it so labeled into the market, are liable to all persons who, without fault on their part, are injured by using it as such medicine in consequence of the false label, the rule being that the liability in such a case arises, not out of any contract or direct privity between the wrongdoer and the person injured, but out of the duty which the law imposes on him to avoid acts in their nature dangerous to the lives of others. He is liable, therefore, though the poisonous drug with the label may have passed through many intermediate sales before it reached the hands of the person injured."¹ Thus,

⁴ Smith v. Middleton, 112 Ky. 588, 66 S. W. 388, 56 L. R. A. 484, 99 Am. St. 308.

⁵ Quin v. Moore, 15 N. Y. 432. See also Peters v. Johnson, 50 W. Va. 644, 41 S. E. 190, 57 L. R. A. 428, 88 Am. St. 909; Minner v. Scherpich, 5 N. Y. St. Rep. 851; McCubbin v. Hastings, 27 La. Ann. 713.

⁶ George v. Skivington, L. R. 5 Exch. 1.

⁷ Minner v. Scherpich, 5 N. Y. St. Rep. 851.

⁸ Walton v. Booth, 34 La. Ann. 913.

⁹ Thomas v. Winchester, 6 N. Y. 397, 57 Am. Dec. 455.

¹⁰ Howes v. Rose, 13 Ind. App. 674, 42 N. E. 303.

¹¹ Smith v. Hays, 23 Ill. App. 244.

¹² Kennedy v. Plank, 120 Wis. 197, 97 N. W. 895.

¹³ Butterfield v. Smellenburg (Pa.), 79 Atl. 980.

¹ National Saving Bank v. Ward, 100 U. S. 195, 25 L. Ed. 621;

where a husband purchased from a druggist as oil of sweet almonds, and which was labeled "Oil of Almonds," but which was in fact oil of bitter almonds, and his wife took the oil actually purchased, resulting in her death, it was held that the administrator of the wife's estate could recover, under the statute, damages for her death. It was contended that there was no such privity of contract between the druggist and the deceased as imposed upon him a duty toward her, but the court said in answer to this: "It is not a sound proposition to say that a dealer in drugs, having in stock and for sale deadly poisons, owes no duty to persons who do not deal with him in relation to them. The public safety and security against the fatal consequences of negligence in keeping, handling and disposing of such dangerous drugs is a consideration to which no dealer can safely close his eyes. An imperative social duty requires of him that he use such precautions as are likely to prevent death or serious injury to those who may, in the ordinary course of events, be exposed to the dangers incident to the traffic incident in poisonous drugs."² Consequently for a druggist to fill an order for calomel tablets with morphine and place them in a box labeled "Calomel," without giving notice of the fact, is such an act of gross negligence as renders him liable in punitive damages to the person injured or to his administrator.³ "We can not say," said the court in the case just cited, "that one holding himself out as competent to handle such drugs, and who does so, having rightful access to them, and relied upon by those dealing with him to exercise that high degree of caution and care called for by the peculiarly dangerous nature of this business, can be heard to say that his mistakes, by which he furnishes a customer the most deadly of drugs for those comparatively harmless, is not, in and of itself, gross negligence, and that of an aggravated form. In

Thomas v. Winchester, 6 N. Y. 397, 57 Am. Dec. 455; Wise v. Morgan, 101 Tenn. 273, 48 S. W. 971, 44 L. R. A. 548, 4 Chic. L. J. Wkly. 69.

² Davis v. Guarnieri, 45 Ohio St. 470, 15 N. E. 350, 4 Am. St. 548.

³ Smith v. Middleton, 112 Ky. 588, 66 S. W. 388, 56 L. R. A. 484, 99 Am. St. 308.

a business so hazardous, having to do so directly and frequently with the health and lives of so great a number of people, the highest degree of prudence for the safety of those dealing with such dealer is required. And that degree of care exacted of such dealer be required, also, of each servant intrusted by him with the conduct of his calling."⁴ Where a druggist was given a bottle labeled "Carbolic Acid," and was asked for arnica, but filled it with carbolic acid, and did not attach a new label, his negligence was held to be the proximate cause of the injury to one who used the carbolic acid supposing it to be arnica.⁵

§ 629. Failure to Label a Poison—Physician's Prescription.

Statutes have been enacted in almost every State requiring poisons to be labeled as a warning to all persons coming in contact with them, and a failure to comply with these statutes is such an act of negligence as will render liable those whose duty it is to place such labels upon the poisons, if by such omission a person be injured. A statute of this character, however, does not apply to medicines compounded upon the prescription of a physician, though it contains poison. And where a druggist negligently failed to label a bottle poison, his negligence was held to be the proximate cause of the death of an irresponsible child who got the bottle from the mantelpiece where the mother had left it, not knowing of its dangerous character, and drank the contents, resulting in its death. The mother's negligence in leaving the bottle accessible to the child was not such an intervening negligence on the part of a responsible agent as broke the chain of causation, and became itself the judicial cause. If the mother had been aware of the poisonous character of the substance it might have been otherwise, and if the bottle had been labeled "poison" she would thereby have been admonished of its dangerous character.¹ An averment in a complaint

⁴ Smith v. Middleton, *supra*.

⁵ Peterson v. Westmann, 103 Mo. App. 672, 77 S. W. 1015, distinguishing Fowler v. Randall, 99 Mo. App. 407, 73 S. W. 931.

¹ Wise v. Morgan, 101 Tenn. 273, 48 S. W. 971, 44 L. R. A. 548; Horst v. Walter, 53 N. Y. Misc. Rep. 591, 103 N. Y. Supp. 750.

that the defendant negligently put up and sold a poisonous drug instead of a harmless medicine called for, authorizes proof that such drug was labeled "poison," as a statute required.² But where a druggist sold to an intoxicated man poison, and unlawfully neglected to put upon the package a label of its contents as the statute required, and the purchaser, while still intoxicated, drank the poison, and died from the effects, it was held that no action lay against the druggist, for the proximate cause of his death was the act of the decedent in administering the poison to himself, and not of the druggist in selling it without a label.³ But it is negligence per se to sell a package of poison unlabeled when a statute requires it to be labeled; yet it is incumbent upon the plaintiff to show that the violation of the statute was the proximate cause of the death; and the question whether the defendant's negligence was the proximate cause of the injury is one for the jury.⁴ A druggist who was not a registered pharmacist sold to the deceased's servant more than five grains of strychnine without placing a label on the outside of the package designating the name of the poison and the name of an antidote, and without making any inquiry as to the purpose for which the strychnine was to be used, as a statute required. A nurse gave the deceased strychnine from the package, supposing it to be morphine, and the deceased immediately thereafter died from its effect. It was held that such facts entitled the deceased's administrator to recover damages from the druggist for a violation of this statute. The plaintiff proved a cause of action under the statute, as well as for defendant's negligence in the sale of the poison, independent of the statute, and it was held error to charge the jury that if the defendant, in selling the poison, did not

² *Davis v. Guarnieri*, 45 Ohio St. 470, 15 N. E. 350, 4 Am. St. 548. In this case it was held not error for the court in its charge to allude to the statute making it unlawful to sell a poisonous drug without labeling it "Poison." See

also *Fisher v. Golladay*, 38 Mo. App. 531.

³ *Ronker v. St. John*, 21 Ohio Cir. Ct. Rep. 39, 11 Ohio C. D. 434.

⁴ *Burk v. Creamery Package Mfg. Co.*, 126 Iowa 730, 102 N. W. 793, 106 Am. St. 377.

comply with the statute, and plaintiff's decedent came to her death by reason of the failure to do so, the plaintiff was entitled to recover.⁵

§ 630. Implied Representation that Drug Requested for a Particular Purpose is Fit for Such Purpose.

If a person applies to a druggist for a solution or medicine for a particular purpose, and the druggist furnishes it, there is an implied representation on the part of the druggist that the drug or solution is fit for the particular purpose. Thus, where plaintiff applied to a druggist for a solution to wash a wound, and the druggist furnished a solution containing 86 percent of carbolic acid, it was held that he was liable for the injuries sustained in using the solution for a wash, and that the plaintiff was justified in using the solution without further inquiry.¹

§ 631. Implied Representation that Drug Delivered is the Drug Called for.

It scarcely needs to be stated that, if a person goes into a drugstore and makes a request for a particular drug, and the druggist in compliance, apparently, with that request, delivers him a drug, there is an implied representation on the part of the druggist that the drug delivered is the drug requested, and the purchaser is not bound to make an examination of the drug delivered, or make further inquiry, to see that no mistake had been made. The purchaser has a right to rely upon the implied representation of the druggist that the drug delivered to him was the drug he called for. Of

⁵ Sutton v. Wood, 120 Ky. 23, 85 S. W. 201, 27 Ky. L. Rep. 412.

¹ Horst v. Walter, 53 N. Y. Misc. Rep. 591, 103 N. Y. Supp. 750; Brunswick v. White, 70 Tex. 504, 8 S. W. 85; Kennedy v. Plank, 120 Wis. 197, 97 N. W. 895.

A similar ruling was made where a physician's prescription

called for aromatic spirits of ammonia, to be taken inwardly, and the druggist put up the ammonia in its pure state without weakening it with water. In the state he put it up in it was a very dangerous drug. Butterfield v. Smellenburg (Pa.), 79 Atl. 980.

course, if he knows a mistake has been made, then he must act accordingly, for if he then takes the drug, and is injured, he would be guilty of contributory negligence.¹

§ 632. Drug Sold for Specific Purpose.

If a druggist sells a drug for a specific purpose he impliedly represents it as suitable for that purpose. Thus, where a person asks a druggist for a drug for a particular, specified purpose, and the druggist furnishes it, he impliedly represents the drug sold to be suitable for that purpose. Hence, where one was asked for corrosive sublimate "to apply to the body to kill lice," and the druggist prepared it for that purpose, but made the solution so strong that it caused severe injury, he was held liable for damages, the use being considered as a sale of a harmful drug sold as a harmless one.¹

§ 633. Druggist Recommending a Prescription.

A druggist who in good faith recommends a prescription, then fills it when requested to do so, and the medicine so compounded produces an injury to the person taking it, is not liable, if he properly filled the prescription. Such was to be the case where a druggist in good faith recom-

noepel v. Atkins, 40 Ind. App. 11 N. E. 600. In this case the plaintiff averred that the defendant sold a drug to her for phosphate of soda, and that from the said drug thus sold by the defendant for phosphate of soda she received the dose which injured her, and that it was acetanilide; that she knew nothing about the appearance of either drug, and believed the medicine she was taking to be phosphate of soda, and that the verdict was for the defendant on those allegations. It was held that it was a harmless error to give an instruction which

left out the element of contributory negligence on the part of the plaintiff.

See upon the general proposition, *Horst v. Walter*, 53 N. Y. Misc. Rep. 591, 103 N. Y. Supp. 750; *Kennedy v. Plank*, 120 Wis. 197, 97 N. W. 895.

¹ *Goldberg v. Hegeman & Co.*, 60 N. Y. Misc. 107, 111 N. Y. Supp. 679. In this case as the druggist sold the drug as fit for the purpose for which he sold it, his liability was held not affected by his failure to label it as fit for that purpose.

mended the prescription of another person, to the owner of a sick horse, who ordered him to put it up, and paid him, and the compound injured the horse.¹ But where the plaintiff asked a druggist for a preparation to wash a wound, and he furnished a solution containing over 86 percent of carbolic acid, without giving a proper label or instruction, it was held that he was negligent, and liable for the injuries sustained by the plaintiff in using the solution as a wash for the wound.²

§ 634. Chemical Mixed After Sale with Another Chemical Producing Dangerous Compound.

If a druggist furnishes by mistake a harmless chemical, not knowing to what use it is to be put, which, if mixed with another harmless chemical, produces a dangerous agent, he will not be liable if the mixture cause injury to the person repurchasing it from the first purchaser. Thus, where a wholesale druggist furnished by mistake sulphide of antimony for black oxide of manganese, to a retail druggist, he was held not liable to a purchaser from the druggist for damages caused in the use of the article which was not injurious except when used in composition with another chemical agent, the wholesale druggist not knowing that it was to be resold to this particular purchaser.¹

§ 635. Sale of Drug to Minor in Violation of Statute.

If a druggist sell a deadly drug to a minor in violation of a statute prohibiting it, without further negligence, which leads to his injury or death, although the act of sale is negligence per se, thereby leaving the sole question whether it was the proximate cause of the injury or death, yet if the minor had arrived at sufficient age to be capable of contributory negligence there can be no recovery, for the

¹ Ray v. Burbank, 61 Ga. 505,
34 Am. Rep. 103.

¹ Davidson v. Nichols, 11 Allen
514.

² Horst v. Walter, 53 N. Y. Misc.
Rep. 591, 103 N. Y. Supp. 750.

act of the minor, and not the sale of the drug to him, must be considered the proximate cause of the injury or death.¹ And where a druggist sold unlawfully a poisonous drug to a minor, a quantity of which by this minor was administered to another minor, to his injury, it was held that the father of the latter had no cause of action against such druggist for the loss of his son's services and medical expenses; for it can not be said that the druggist might reasonably have anticipated such use of the drug where, under the circumstances, the presumption arises that the purchaser knew of the qualities of the drug and the effect it would produce.²

636. Negligently Compounding Prescription—Illegible Prescription.

It is the duty of a druggist to compound a prescription as it is written by the physician. If he faithfully does that he is not liable for fatal results that follow from the patient taking the medicine prescribed. But if he knows the physician has made a mistake, and that the medicine as compounded will be dangerous or fatal, then it is his duty to call the physician's attention to the mistake, and if he does not, but prepares the medicine according to the prescription, and gives no warning that it is dangerous, he will be liable for the result it produces. But if the prescription is illegibly written that a druggist, notwithstanding the exercise of ordinary care, makes such a mistake in mixing the ingredients as to injure the person taking the compound, the druggist is not liable in damages to the person injured.¹ In a prescription called for "Elixir Pinus Comp. cum Heroin—" the druggist had a bottle of "Elixir Pinus Comp. cum Heroin," and a bottle of Heroin, and, on consulting a label issued by the maker of the Heroin and the Elixir Pinus Comp. cum Heroin, he found that such manufacturer also put

King, 72 Miss. 1, 16 L. R. A. (N. S.) 646, 126 Am. St. R. A. 474. 677.

v. F. E. Box & Co., ¹ McClardy v. Chandler, 2 Wkly. 113 N. W. 168, 13 Law Gaz. 1.

up a compound known as "Elixir Pinus Compositus with Heroin," and the formula in the pamphlet showed that the proportion of Heroin in the Elixir Pinus Compositus with Heroin was $\frac{1}{24}$ of a grain per drachm, whereupon, in filling the prescription, he added $\frac{1}{24}$ of a grain of Heroin to each drachm of Heroin to each drachm of Elixir Pinus Compositus. It was held that he was not negligent in so compounding the prescription.² If a druggist so carelessly compound a mixture in his store as to cause an explosion which injures a person therein, he is liable, if he failed to exercise the utmost care to avoid the injury, if the mixture was such that a well-educated druggist should reasonably suspect danger from an explosion.³

§ 637. Purchaser Informed of Deadly Character of Drug.

Notwithstanding a statute makes it an offense to sell a poison without labeling it, yet if a druggist selling a poison inform the purchaser of its deadly character, and warns him against the improper use of it, he will not be liable in damages for causing the death of the purchaser who inadvertently takes it, for by taking it, after such warning, he contributes to his own injury, which will preclude his recovering damages.¹ So where the plaintiff's wife sent a fourteen-year-old girl to a drugstore to purchase morphine to be used by her (the wife), and the girl had knowledge of the dangerous character of the drug, and warned her not to take the entire contents of one packet, on the ground she thought it was too much, it was held that the wife was charged with knowledge of the poisonous character of the drug, and the plaintiff could not recover.² But where a person sent a bot-

² *Laturen v. Bolton Drug Co.* (N. Y.), 93 N. Y. Supp. 1035.

³ *Kerr v. Clason*, 2 Ohio Dec. 666, 4 West. Law Mon. 488.

The filling of a prescription for aromatic spirits of ammonia to be taken internally, with the liquid in its undiluted condition is such negligence as renders the druggist

liable to the person taking it to his injury. *Butterfield v. Smellenburg* (Pa.), 79 Atl. 980.

¹ *Wohlfahrt v. Beckert*, 92 N. Y. 420, 44 Am. Rep. 406, affirming 27 Hun 74; *Ray v. Burbank*, 61 Ga. 505, 34 Am. Rep. 103.

² *Fowler v. Randall*, 99 Mo. App. 407, 73 S. W. 931.

tle with a label on it marked "Carbolic Acid" to a druggist to be filled with arnica, and he filled it with carbolic acid, and not arnica, and did not change the label, and did not inform the person to whom he delivered it that he had not put arnica in it, it was held that such person was not guilty of contributory negligence because he used the carbolic acid to his injury, not heeding the label, and supposing the liquid to be arnica. The negligence of a medical student, who had recommended arnica for a cracked finger, in not discovering that the liquid sent by the druggist was carbolic acid instead of arnica, was held not to be imputed to the injured person, as to preclude him recovering for the druggist's negligence.³ Where a druggist was guilty of negligence in the sale of strychnine, the proximate result of which was the death

of the plaintiff's intestate, it was held no defense for the druggist that the negligence of the intestate's nurse in administering the poison concurred with the druggist's negligence in causing the intestate's death.⁴ An agent for the plaintiff called at the defendant's drugstore and asked for quinine, but was given morphine, and told by the clerk that that was the best French quinine. The clerk testified that he delivered what was called for, and that ounce bottles of quinine and morphine were kept in separate places, some distance apart, and both were wrapped in blue paper. The court told the plaintiff that the plaintiff could not recover if his agent got what was called for, and then refused to say that he could not recover if his agent was negligent in not examining the label on the bottle, and this was held not error, for no evidence was shown that the giving of the instruction refused.⁵ A defendant gave for the plaintiff a dose of belladonna by mistake for opium, from a jar properly labeled. Plaintiff then

asked the wife said, "she told the druggist knew what he ought to," and swallowed the morphine. It was held that the defendant was liable for contributory negligence of plaintiff's wife, for so much of the instruction refused.

ing whether the quantity so taken was a proper or fatal dose.

³ Peterson v. Westmann, 103 Mo. App. 672, 77 S. W. 1015.

⁴ Sutton v. Wood, 120 Ky. 23, 85 S. W. 201, 27 Ky. L. Rep. 412.

⁵ Brunswig v. White, 70 Tex. 504, 8 S. W. 85.

took a portion from the same jar, and asked the defendant if it was a dose, to which he replied, "Yes." He then swallowed it. It was held that the failure of the court to instruct, without qualification, that if the plaintiff was guilty of contributory negligence he could not recover, was error, there being no evidence that the defendant knew the plaintiff's danger, to support an instruction that, in that event, he would be liable, even if such defendant took no steps to avoid the danger.⁶ A father procured a prescription for his little daughter, which called for medicine in the form of a powder, to be given once every three hours. It was left with the child's mother, who was informed by the child's physician that it would be in powder form, and directed to give one every three hours. By mistake the druggist sent the medicine in liquid form (of another customer), the label on the bottle being marked with his name, and containing directions to give one teaspoonful every two hours, which was delivered. The father was not present when the information and directions were given by the physician, but before any of the medicine was given he was informed by the mother what were the directions. He also read the directions on the bottle, and knew that the prescription was for powder. He was present when the liquid was given to the child, and permitted it to be done. After the first dose, and when nearly time for the second, he suspected something was wrong, and telephoned the doctor from a neighbor's residence. He left the house without imparting to his wife his suspicions or directing her to delay the second dose until he had heard from the doctor, and it was given before his return, and the daughter afterwards died. It was held that these facts showed that the father was guilty of contributory negligence, and could not recover damages for the loss of his child.⁷

⁶ Gwynn v. Duffield, 61 Iowa 64, 15 N. W. 594, 47 Am. Rep. 802.

⁷ Scherer v. Schlager, 18 N. D. 421, 122 N. W. 1000; Van Lien v. Scoville Mfg. Co., 14 Abb. Pr. (N. S.) 74.

It may be shown that the plaintiff was so drunk when he took the poison that he did not know what he was doing. McVeigh v. Gentry, 72 N. Y. App. Div. 598, 76 N. Y. Supp. 535.

§ 638. Knowingly Administering Poison or Unwholesome Food.

To knowingly administer poison to another without his consent is an assault and battery, rendering the person administering it liable to a criminal prosecution. Thus, where a druggist, at the request of a customer, dropped croton oil in a piece of candy which the purchaser gave to another person, who ate the candy so drugged, to his injury, the druggist knowing, or having reason to believe, that the dose was intended for such person, or for someone else as a trick, and not for medical purposes, he was held liable upon a criminal charge of assault and battery.⁸

9. Plaintiff, Without Consent of Defendant, Taking by Mistake Dangerous Drug from Properly Labeled Vessel.

Where the plaintiff went into the defendant's drugstore and helped himself to what he supposed was a dose of the root of dandelion, but which was belladonna, and claimed he bought and took under the defendant's direction, but it was that the jar was properly labeled, and plaintiff read, and his only excuse was that the defendant had made the same mistake in filling an order, it was held a jury should have been told that if the plaintiff was free of contributory negligence he could not recover for damages caused thereby.¹

Prima Facie Showing of Negligence in Sale of Drug.

It is shown that one drug was called for and another was delivered without any information being given that the one was not delivered, there is a prima facie case of

Monroe, 121 N. C. 677,
, 61 Am. St. 686, 43
1; *Commonwealth v.*
Mass. 303, 19 Am.
Regina v. Loch, 12 Cox
Regina v. Sinclair, 13
Regina v. Button, 8

C. & P. 660; *McClure v. Klein*,
60 Tex. 168 (inducing an habitual
drunkard to drink three pints of
liquor at one sitting, to his death).
¹ *Gwynn v. Duffield*, 66 Iowa 708,
55 Am. Rep. 286, 61 Iowa 64, 47
Am. Rep. 802.

negligence on the part of the druggist.¹ A druggist is bound to know the medicines he compounds, and he can not excuse himself from liability by showing that he used extraordinary care and diligence in compounding the medicine.² In an Indiana case this rule was applied to a sale of a deadly drug by mistake: "Where an accident happens resulting in the injury to a person or his property, and it is made to appear that all the instrumentalities causing the accident are under the exclusive control and management of the defendant, and the accident is such as ordinarily would not occur if due care was exercised by those who have control of such instrumentalities, and the duty to exercise such care is owing the plaintiff from the defendant, then proof of the circumstances of the accident and injury resulting therefrom rests on the defendant the presumption of negligence and the burden of explaining the accident consistent with due care on his part. Does this rule," asks the court, "apply to the case of a druggist who, by mistake, deals out poison to a customer who calls for a harmless remedy? What duty does the druggist owe to the customer? All the authorities agree, and the very necessities of the case require, that the highest degree of care known to practical men must be used to prevent injuries from the use of drugs and poisons. It is for these reasons that a druggist is held to a special degree of responsibility. The care required must be commensurate with the danger involved. The skill employed must correspond with that superior knowledge of the business which the law requires. The same rule that applies to the common carrier of passengers, and for the same reason—that is, that the life and safety from bodily harm of a passenger is at hazard, and his security due to the care and skill of the carrier alone, and under

¹ *Howes v. Rose*, 13 Ind. App. 674, 42 N. E. 303; *Smith v. Hayes*, 23 Ill. App. 244; *Davis v. Guarnieri*, 45 Ohio St. 470, 15 N. E. 350, 4 Am. St. 548; *Minner v. Sherpich*, 5 N. Y. St. Rep. 851; *Norton v. Sewall*, 106 Mass. 143,

8 Am. Rep. 298; *Walton v. Booth*, 34 La. Ann. 913; *Davidson v. Nichols*, 11 Allen 514; *Hansford v. Payne*, 11 Bush 380.

² *Fleet v. Hollenkamp*, 13 B. Mon. 219.

circumstances where the passenger is powerless to protect himself—applies to the druggist. So, too, the life and death of a customer at the druggist's counter is at hazard, and he is equally dependent for security upon the care and skill of the druggist, and is equally powerless to protect himself. Are the agencies by which the customers may be injured by mistake exclusively under the management and control of the druggist? To ask this question is to answer it. The poisons and the harmless medicines in which he deals are on his shelves—in his receptacles. He puts them there, he takes them down, he deals them out to the customer, who is not presumed to be able to identify them, and who, as a rule, could not know quinine from strychnine or acetanilid from phosphate of soda. And is a mistake in the dealing out of medicine such an accident as may ordinarily be expected if due care is used by the druggist? Most certainly not.

Being the case, no sound reason can be found for refusing to apply the rule above announced to the case of a druggist dealing out a poisonous drug by mistake to a customer who asks for a harmless remedy, and we hold that it does.

And when it is shown that a customer calls upon a druggist for a harmless remedy, and the druggist or his clerk deals out to him a poison by mistake, these circumstances constitute a *prima facie* case of negligence against the druggist, and it is upon him to show that his mistake was, under the circumstances, consistent with the exercise of due care on his part. The burden is not imposed upon the purchaser of a drug to go behind the druggist's counter and into the details of his business, and explain how it came about that the druggist made the mistake, and that there was negligence in the way the goods were handled by him somewhere in the course of their transit through his hands into the hands of the purchaser."³

Atkins, 40 Ind. App. 600. The court overruled *Rose*, 13 Ind. App. 303, 55 Am. St. 455, and adds: "This

view is not inconsistent with the decision of the Supreme Court of Michigan in the case of *Brown v. Marshall*, 47 Mich. 576. In that case a mandatory instruction was

§ 641. Complaint—Pleading.

A complaint which charges that the defendant was a druggist, that he negligently sold to the plaintiff a particular drug that was poisonous instead of one that was not poisonous, which was ordered by the plaintiff, to the plaintiff's damage, states a cause of action. "It is not, generally speaking, necessary in actions for negligence that the complaint set forth the circumstances which tend to show negligence. It is sufficient to allege generally the doing of the act that led to the injury, and that it was negligently done. The alleged wrongful act charged in this case, as leading to the injury, was the delivery by the defendant's clerk to Wolfe, the agent of Dorcas Scott, when calling for phosphate of soda, of the poisonous drug acetanilid, and to allege that this act was negligently done was sufficient."¹ If the complaint alleges negligence generally, and gives the details of the transaction, it is not necessary that the evidence show such details to be true, the details being uncontrolling in the complaint as well as in the evidence.² "The wrongful act complained of—the act which led to the injury"—said the Supreme Court of Ohio, "was carelessly selling and delivering to the plaintiff a deadly poison instead of the harmless medicine called for. . . . The allegation in a pleading that the party complained against negligently committed the particular act which led to the injury when redress is sought, furnishes the predicate from the proof of all such incidental facts and circumstances, both of omission and commission, as fairly tend to establish the negligence of the primary fact complained of."³ In an action to recover damages for caus-

given that entirely left out of consideration any explanation the druggist might give of the accident, consistent with the exercise of due care on his part. We do not hold that the druggist may not show that the mistake made by him was excusable, and that the circumstances were such that he could not be charged with lack of

due care. What we do hold is this, that the burden rests upon the druggist to explain his own mistake."

¹ *Knoefel v. Atkins*, 40 Ind. App. 428, 81 N. E. 600.

² *Knoefel v. Atkins*, 40 Ind. App. 428, 81 N. E. 600.

³ *Davis v. Guarnieri*, 45 Ohio St 470, 15 N. E. 350, 4 Am. St. 548.

ing the death of the plaintiff's child, a complaint which alleges that plaintiff's agent, as a customer of the defendant druggist, demanded quinine, but was by the defendant's clerk given morphine instead, and, relying on the representations of the clerk that the drug was quinine, plaintiff administered the same to his daughter, from the effects of which he died, states a good cause of action.⁴

§ 642. Where Action Must be Brought.

It would seem axiomatic that an action to recover damages for injuries sustained by negligence in improperly administering or filling prescriptions must be brought in the county district where the defendant resides; but a statute here change this rule. Thus a statute of Texas provided that an action for trespass might be brought in the county where trespass was committed. The petition in an action for injuries in consequence of the use of drugs alleged that the defendant, which the plaintiff used, through the fraud of the defendant, had permanently impaired plaintiff's hearing and caused her severe pain; and the drugs had been sent by defendant from his residence in another county to plaintiff's residence in the county where the suit was instituted, and used by the plaintiff. It was held that the court of the county wherein the suit was brought—the county where the drug was used—had jurisdiction of the person of the defendant and the cause of action, notwithstanding the fact the defendant lived in another county.¹

3. Negligence in Treatment of Injured Person.

to defense that the medical treatment to relieve the was negligent; but a charge that the defendant is

, therefore, may be
to establish negligence
of the appellant in de-
stanilide to his cus-
called for phosphate of
though it does not es-
particular facts and cir-

cumstances averred in the com-
plaint." *Knoefel v. Atkins*, 40 Ind.
App. 428, 81 N. E. 600.

⁴*Brunswick v. White*, 70 Tex.
504, 8 S. W. 85.

¹*Winter v. Terrill*, 42 Tex. Civ.
App. 598, 95 S. W. 761.

liable, without regard to negligence or legal fault, is error.¹ So in an action against a druggist for improperly compounding a prescription with poisons which caused the death of the wife of the plaintiff, it was held that the action was not barred by proof that the woman was at the time very sick with yellow fever, that the attending physician gave a certificate of death from yellow fever, and that the husband caused this certificate to be published in the newspapers.²

§ 644. Punitive Damages.

In a case of gross negligence in the sale of drugs, punitive damages may be awarded; and in some jurisdictions, if not most of them, such damages can be awarded although the sale is made by a servant of the defendant, whether that servant be an individual or corporation.¹

§ 645. Servant Selling Drugs.

If a servant fills a prescription wrongly, to the injury of the person taking it; or if he sells a drug when another is called for, which results in an injury, his master will be liable civilly for his act, even to punitive damages in some jurisdictions.¹ Thus where the brother of the defendant druggist, in the latter's absence, employed a clerk for his, the defendant's, drugstore, it was held that the defendant was liable because of injury resulting from a prescription the clerk improperly filled.² The fact that a statute requires pharmacists to be registered does not relieve a druggist who

¹ Brown v. Marshall, 47 Mich. 576, 11 N. W. 392, 41 Am. Rep. 728.

² McCubbin v. Hastings, 27 La. Ann. 713.

¹ Smith v. Middleton, 112 Ky. 588, 66 S. W. 388, 56 L. R. A. 484, 99 Am. St. 308.

¹ Smith v. Middleton, 112 Ky. 588, 66 S. W. 388, 56 L. R. A. 484, 99 Am. St. 308; Brunswig v.

White, 70 Tex. 504, 8 S. W. 85; Davis v. Guarnieri, 45 Ohio St. 470, 15 N. E. 350, 4 Am. St. 528; Beckwith v. Oatman, 43 Hun 265; Smith v. Hayes, 23 Ill. App. 244; Knoefel v. Atkins, 40 Ind. App. 428, 81 N. E. 600.

² McCubbin v. Hastings, 27 La. Ann. 713; Beckwith v. Oatman, 43 Hun 265.

employs a registered pharmacist as a clerk from liability for negligence of the latter in putting up a prescription.³

Of course, where a druggist is sued for the mistake of his clerk, resulting in injury, the plaintiff must show the clerk's want of due care and skill.⁴ Where a person asked a clerk for a solution to wash his wound, and the clerk furnished a solution containing 86 percent of carbolic acid, it was held that the clerk's employer was liable for the damages occasioned by the use of the solution.⁵

§ 646. Sale of Unwholesome Food.

In an early authority it has been said that a guest might maintain an action against a publican for an injury received from unwholesome food;¹ and in another early case it was held that "if a man sells victuals which is corrupt without warranty, an action lies, because it is against the common-law."² "A dealer who sells goods for consumption impliedly warrants that it is fit for the purpose for which it is

If, in addition to this implied warranty, it is found that he was negligent in selling meats that were dangerous to who ate them, he would be liable for the consequences of his act, if he knew it to be dangerous, or, by proper care on his part, could have known its condition."³ The liability does not rest so much upon an implied contract, as upon a duty or neglected duty voluntarily assumed; and it is necessary to allege in the complaint that the defendant furnished the injurious quality of the food.⁴ Thus a statute

St. v. Sims Drug Co.,
275, 86 N. W. 307, 54
Mich. 245, 55 N. W. 812, 21

St. v. Oatman, 43 Hun

St. v. Walter, 53 N. Y.
591, 103 N. Y. Supp.

Br. 95, 1 Bl. Com. 430.

St. v. Vaughan, Cro. Jac.

96 Mich. 245, 55 N. W. 812, 21
L. R. A. 139. "Those are questions
for the jury and not for the court,"
it was said in the case just cited.

⁴ *Bishop v. Weber*, 139 Mass.
410, 52 Am. Rep. 715; *Wiedeman*
v. Keller, 171 Ill. 93, 49 N. E. 210,
reversing 53 Ill. App. 382; *Van*
Bracklin, 12 Johns. 467, 1 Am. Dec.
399; *Winsor v. Lombard*, 18 Pick.
62.

Parker, Webb & Co.,

prohibiting and punishing as an offense the manufacture or sale of any article of food, if itself be injurious, or if it contains any ingredient injurious to health, makes a manufacturer liable to a person who purchases from a retail dealer. In such an instance the fact that the manufacturer of food did not know it was impure does not affect the question of his liability to one injured in using it; for he was bound to know whether the article which he sold was wholesome and complied with the statute.⁵ In the sale of food, unless there be an express understanding otherwise, there is an implied warranty that the food sold is fit to be used as food, and if it is not the vendor is liable for the breach of implied warranty.⁶

§ 647. Implied Warranty in Sale of Food.

There is an implied warranty in the case of a sale of articles of food to be consumed directly in domestic uses, that they are sound and wholesome and fit for consumption.¹

⁵ Meshbesh v. Channellene Oil & Mfg. Co., 107 Minn. 104, 119 N. W. 428, 131 Am. St. 441 (Impure sweet oil for cooking purposes.)

⁶ Sinclair v. Hathaway, 57 Mich. 60, 23 N. W. 459, 58 Am. So. 327; Copas v. Anglo-American Provision Co., 73 Mich. 541, 41 N. W. 690; Craft v. Parker, 96 Mich. 245, 55 N. W. 812, 21 L. R. A. 139; Hover v. Peter, 18 Mich. 51.

¹ Winsor v. Lombard, 18 Pick. 61; French v. Vining, 102 Mass. 132, 3 Am. Rep. 440; Howard v. Emerson, 110 Mass. 320, 14 Am. Rep. 608; Burch v. Spenser, 15 Hun 504; Divine v. McCormick, 50 Barb. 116; Hyland v. Sherman, 2 E. D. Smith 234; Hart v. Wright, 17 Wend. 267; Hoe v. Sanborn, 21 N. Y. 552, 78 Am. Dec. 163; Moses v. Mead, 1 Denio 378, 43 Am. Dec. 673; Van Bracklin v. Fonda, 12 Johns. 468, 7 Am. Dec.

339; Hoover v. Peters, 18 Mich. 51; Humphreys v. Comline, 8 Blackf. 516; Withams v. Slaughter, 3 Wis. 347; Copas v. Anglo-American Provision Co., 73 Mich. 541, 41 N. W. 690; Getty v. Rountree, 2 Pinney 379, 2 Chand. 28, 54 Am. Dec. 138; Moore v. McKinley, 5 Cal. 471; Jones v. Murray, 3 T. B. Mon. 83; Osgood v. Lewis, 2 Harr. & G. 495, 18 Am. Dec. 317; McNaughton v. Joy, 1 W. N. C. 470; Ryder v. Neitge, 21 Minn. 70; Sinclair v. Hathaway, 57 Mich. 80, 58 Am. Rep. 327; Lukens v. Freund, 27 Kan. 664, 41 Am. Rep. 429; Goad v. Johnson, 6 Heisk. 340; Beer v. Walker, 46 L. J. C. P. 677; Emmerton v. Mathews, 7 H. & N. 586; Smith v. Baker, 40 L. T. (N. S.) 261; Clarke v. Stanciliffe, 7 Exch. 439; Burnby v. Rollitt, 16 Mees. & Wels. 644.

Warranty of fitness is implied from the payment of a sound price.² Usually purchases of food are made in reliance upon the supposed skill of the seller.³ In one case there was some evidence that the defendant knew the animal to be diseased before it was slaughtered, and the court held that when he sold it for domestic use he was bound at his peril to know that the meat was sound and wholesome.⁴ In another instance buyers and packers of pork for shipment to markets for food, purchased a hog from the defendant who knew it to be boar meat unfit for food, that it was intended to be used for food, and not for manufacture into grease or tallow, and he concealed and denied the facts, the court held there was an implied warranty of fitness for food.⁵ Where the defendant sold a heifer, he at the time knowing it to be for immediate consumption, and knowing or having reason to suspect that it was diseased and unwholesome, it was held that he was bound to make his knowledge of its condition known to the purchaser, even though the disease was not externally visible.⁶ A baker sold bread at a discount to a peddler, for sale, not as a wholesale dealer but as a mere middleman and acting as his agent in his employ, and it was held that he impliedly warranted the wholesomeness of his bread.⁷ Where meats were purchased from a wholesale dealer and manufacturer without an opportunity for inspection, and packed by a process unknown to the purchaser, it was held that there was an implied warranty of their fitness for food.⁸ In a few cases, however, it has been denied that anything can be inferred from a sale of provisions, which may not be inferred from a like purpose in other cases.⁹

² Van Bracklin v. Fonda, 12 Johns. 468, 7 Am. Dec. 339; Hart v. Wright, 17 Wend. 267; Gray v. Cox, 6 Dowl. & R. 200, 8 Dowl. & R. 220.

³ French v. Vining, 102 Mass. 132, 3 Am. Rep. 440.

⁴ Van Bracklin v. Fonda, 12 Johns. 468, 7 Am. Dec. 339.

⁵ Burch v. Spencer, 15 Hun 504.

⁶ Divine v. McCormick, 50 Barb.

116; Good v. Johnson, 6 Heisk. 340.

⁷ Sinclair v. Hathaway, 57 Mich. 60, 58 Am. Rep. 327.

⁸ Copas v. Anglo-American Provision Co., 73 Mich. 541, 41 N. W. 690; Tomlinson v. Armour & Co., 75 N. J. L. 748, 70 Atl. 314, 19 L. R. A. (N. S.) 923.

⁹ Wright v. Hart, 18 Wend. 464; Emerson v. Brigham, 10 Mass. 197; Winsor v. Lombard, 18 Pick. 57.

When we come to an instance of a sale between dealers, as where food is sold as merchandise and not as provisions for consumption by the purchaser, a different rule prevails, the courts holding that there is not, in the absence of fraud, any implied warranty of fitness.¹⁰ Thus where a farmer killed a hog and sold it with a knowledge that it was to be used for food, it was held that there was no implied warranty as to fitness for human food, the sale not being made by common dealers or marketmen, and only a casual one without any guilty knowledge of the defect.¹¹ So in a sale of molasses in barrels at the market price to a grocer to retail where the quality of the molasses was not examined—the barrels being present at the sale—it was held there was no implied warranty that such molasses was fit for the purpose for which it was purchased.¹² The same ruling was made with reference to barrels of beef sold on the market to dealers, there being no affirmative warranty concerning their condition.¹³ Where a drover took his cattle to market and sold them to a butcher, it was held that no implied warranty was raised in the absence of misrepresentation, concealment or knowledge that they were injured.¹⁴ A stronger case this: Hogs were purchased by a dealer to be used in his meat market. He examined them and found they were not in the best condition, the owner stating, however, they were healthy as

¹⁰ Howard v. Emerson, 110 Mass. 320, 14 Am. Rep. 608; Emerson v. Brigham, 10 Mass. 197; Winsor v. Lombard, 18 Pick. 61; Hart v. Wright, 17 Wend. 267; Wright v. Hart, 18 Wend. 449; Moses v. Mead, 1 Denio 378, 43 Am. Dec. 673; Burnby v. Rollitt, 16 Mees. & Wils. 644; Giroux v. Stedman, 145 Mass. 439, 14 N. E. 538, 1 Am. St. 472; Rinschler v. Jelffe, 9 Daly 469; Goldrich v. Ryan, 3 E. D. Smith, 324; Miller v. Scherder, 2 N. Y. 262; Ryder v. Neitge, 21 Minn. 70; Mattoon v. Rice, 102 Mass. 236; Hyland v. Sherman, 2

E. D. Smith 234; Goad v. Johnson, 6 Heisk. 340; Jones v. Murray, 3 T. B. Mon. 83; Fairbank Canning Co. v. Metzger, 43 Hun 71; Emmerton v. Mathews, 7 H. & N. 586; Smith v. Baker, 40 L. T. (N. S.) 261.

¹¹ Giroux v. Stedman, 145 Mass. 439, 14 N. E. 538, 1 Am. St. 472.

¹² Humphreys v. Comline, 8 Blackf. 516. See also McRoy v. Wright, 25 Ind. 22.

¹³ Emerson v. Bingham, 10 Mass. 197.

¹⁴ Goldrich v. Ryan, 3 E. D. Smith 324.

far as he knew. The hogs had no perceptible disease. The hogs, having died from cholera and become worthless by disease existing at the time of the purchase, the court held that there was no implied warranty of their fitness for slaughter.¹⁵ There is no implied warranty where no representations are made and the purchaser has full opportunity to make an examination, whether he makes the examination or not.¹⁶ Thus where rabbits were sold and shipped to a dealer which were found on arrival to be putrid, it was held that there was no implied warranty that they would be in a merchantable condition and fit for consumption within a reasonable time after reaching the purchaser, in the absence of anything exceptional in the transit.¹⁷ But where there was a contract to purchase all the liquor consumed upon certain premises from one party, it was held that the law implied a warranty on the part of the seller that it should be fit to drink.¹⁸

§ 648. Eating Unwholesome Food in a Restaurant—Proof of Negligence.

If a person goes into a public restaurant and eats unwholesome food, not knowing it to be such, he must, in order to recover damages from the person keeping the restaurant, establish carelessness or negligence on his part. His liability is not that of an innkeeper in protecting his guest from theft. In such an instance proof of the fact of eating the food and of consequent sickness is not sufficient to make a *prima facie* case in his favor against the restaurant keeper, nor to shift the burden on the latter to establish due care. "Plaintiff claims that, having proved that she ate the oyster broth at defendant's restaurant, and in consequence became sick, her case is made out, at least the burden of proof is shifted on the defendants. If this rule was adopted, the plaintiff would

¹⁵ Needham v. Dial, 4 Tex. Civ. App. 141, 23 S. W. 240.

¹⁶ Rinschler v. Jelliffe, 9 Daly 469.

¹⁷ Beer v. Walker, 46 L. J. C. P. 677.

¹⁸ Clarke v. Standliffe, 7 Exch. 439; Burnby v. Rollitt, 16 Mees. & W. 644.

be relieved from proving the most important element of her declaration, the negligence of the defendants, which is really the foundation of the action. This would, in effect, make the restaurant keeper an insurer. Such a rule is not correct in principle, nor has it been sustained, so far as we are advised, by any respectable authority."¹

§ 649. Vendor having Knowledge of Unwholesomeness of Food.

If the vendor has knowledge that the food he is selling is unwholesome, then he is liable for all the ill consequences of his Act, unless the purchaser also knew it was such. Such was held to be the case where a vendor sold a quarter of beef as sound, when it was bad and unwholesome, and he knew when he sold it the beef was diseased.¹ But where a farmer killed and sold a hog for provisions to be used by the purchaser it was held that he did not impliedly warrant the hog was fit for food, he making no representations, though some of his hogs were diseased with hog cholera.²

§ 650. Sale of Food under False Description.

A person who knowingly sells food under a false description may be guilty of obtaining money under false pretenses.¹

§ 651. Unwholesome Supply of Water.

Where a water company drew water from a river which was infected in its course through a town in which there was typhoid fever, the company being ignorant of the disease, and the river banks had recently been inspected by the

¹ *Sheffer v. Willoughby*, 163 Ill. 518, 45 N. E. 253, 34 L. R. A. 464, 54 Am. St. 486. But see the first authorities cited in § 646.

¹ *Van Bracklin v. Fonda*, 12 Johns. 467, 7 Am. Dec. 339; *Peckham v. Holman*, 11 Pick. 384.

² *Giroux v. Steadman*, 145 Mass.

439, 14 N. E. 538, 1 Am. St. 472. The court attempts to distinguish this case from *Van Bracklin v. Fonda*, *supra*, although the facts are quite similar.

¹ *Regina v. Foster*, 2 Q. B. Div. 301, 41 J. P. 295.

company, it was held that it was not liable in damages for the death of one who drank the water and contracted typhoid fever.¹

§ 652. Food for Cattle and Horses.

If a vendor of hay, knowing that some poisonous substance had been spilt upon it, but believing he had separated the hay thus contaminated from the remainder, sell of that remaining in which some of the poisonous matter still remains, he will be liable to the purchaser whose cattle or horses eat it and are injured thereby.¹ But in the absence of negligence on his part, it was held in one case that a miller is not liable as upon an implied warranty for injury to cattle from bran bought from him into which, without his negligence, pieces of metal had accidentally fallen.² The seller of bran, knowing that the buyer desired to use it as food for his stock and wanted pure wheat bran, is liable for damages caused by the delivery of mixed food.³ Where a contract for the sale of corn chops was evidenced by a written order for the chops requiring them to be "delivered guaranteed," it was held that there was a guaranty of merchantable quality on delivery.⁴ A statute of Michigan⁵ regulated the sale of "all condimental stock foods, patented and proprietary stock foods, claimed to possess nutritive properties and all other materials intended for feeding to domestic animals." This was held to include a preparation advertised as food, which, in addition to the possession of medicinal properties, "fattens both cattle and hogs quickly, makes them grow larger and healthier and makes their meat tender, more

¹ *Buckingham v. Plymouth Water Co.*, 142 Pa. 221, 21 Atl. 824.

A city may prohibit bathing in water to be used in supplying its inhabitants with water. *State v. Morse*, 80 Atl. 189.

¹ *French v. Vining*, 102 Mass. 132, 3 Am. Rep. 440.

² *Lukens v. Freund*, 27 Kan.

664, 41 Am. Rep. 429. The court thought it would be different with human food.

³ *Houk v. Berg* (Tex. Civ. App.), 105 S. W. 1176.

⁴ *Kimball-Fowler Cereal Co. v. Chapman & Dewey Lumber Co.*, 125 Mo. App. 326, 102 S. W. 625.

⁵ Public Acts 1893, p. 421.

juicy and better eating and produces bone, muscle and better staying powers, improves the wind," though the label stated "P's food is a regulator, to be used according to directions, and is not sold as a feeding stuff nor is it to be fed in place of grain or any other feed."⁶

§ 653. Slander.

To charge one with selling adulterated food as pure food may be a slander or libel. Thus where an article in a newspaper charged butter had been sold as pure creamery make, and that the commodity was 40 percent butter and the remainder grease; and that persons dealing with the plaintiff had been misled in purchasing such butter, it was held libelous per se, for the acts so charged involved moral turpitude in the plaintiff, both as an individual and as a dealer in such commodity.¹

§ 654. Recovering Purchase Price on Sale of Impure Food.

If a person sells unwholesome food, the sale of which a statute makes an offense, he can not recover the purchase price from the purchaser. Such was held to be the case of a sale of watered milk, the sale of which a statute prohibited, and it was held that the fact the purchaser had an opportunity to examine the milk, and accepted it after such examination, did not change the rule.¹ So the purchase price of adulterated coffee can not be recovered, where a statute prohibits the sale of adulterated coffee as food.² So one selling a powder for use with an apparatus for preserving fruit, which contains sulphur, can not recover the purchase price, where the use of the sulphur for that purpose is pro-

⁶ Pratt Food Co. v. Bird, 148 Mich. 631, 112 N. W. 701, 14 Detroit Leg. N. 304, 118 Am. St. 601.

¹ Dabold v. Chronicle Pub. Co., 107 Wis. 357, 83 N. W. 639; Witte v. Weinstein, 115 Iowa 247, 88 N. W. 349.

¹ Hecht v. Wright, 31 Colo. 117,

72 Pac. 48; State v. Smith, 69 Ohio St. 196, 68 N. E. 1044.

² Crossman v. Lurman, 192 U. S. 189, 24 Sup. Ct. 234, 48 L. Ed. 401, affirming 171 N. Y. 329, 63 N. E. 1097, 33 N. Y. App. Div. 422, 54 N. Y. Supp. 72.

hibited by statute. A buyer can not recover back the price of an apparatus for preserving fruit because powders used therewith contain sulphur for that purpose was not in fact deleterious, so as to render the apparatus worthless.²

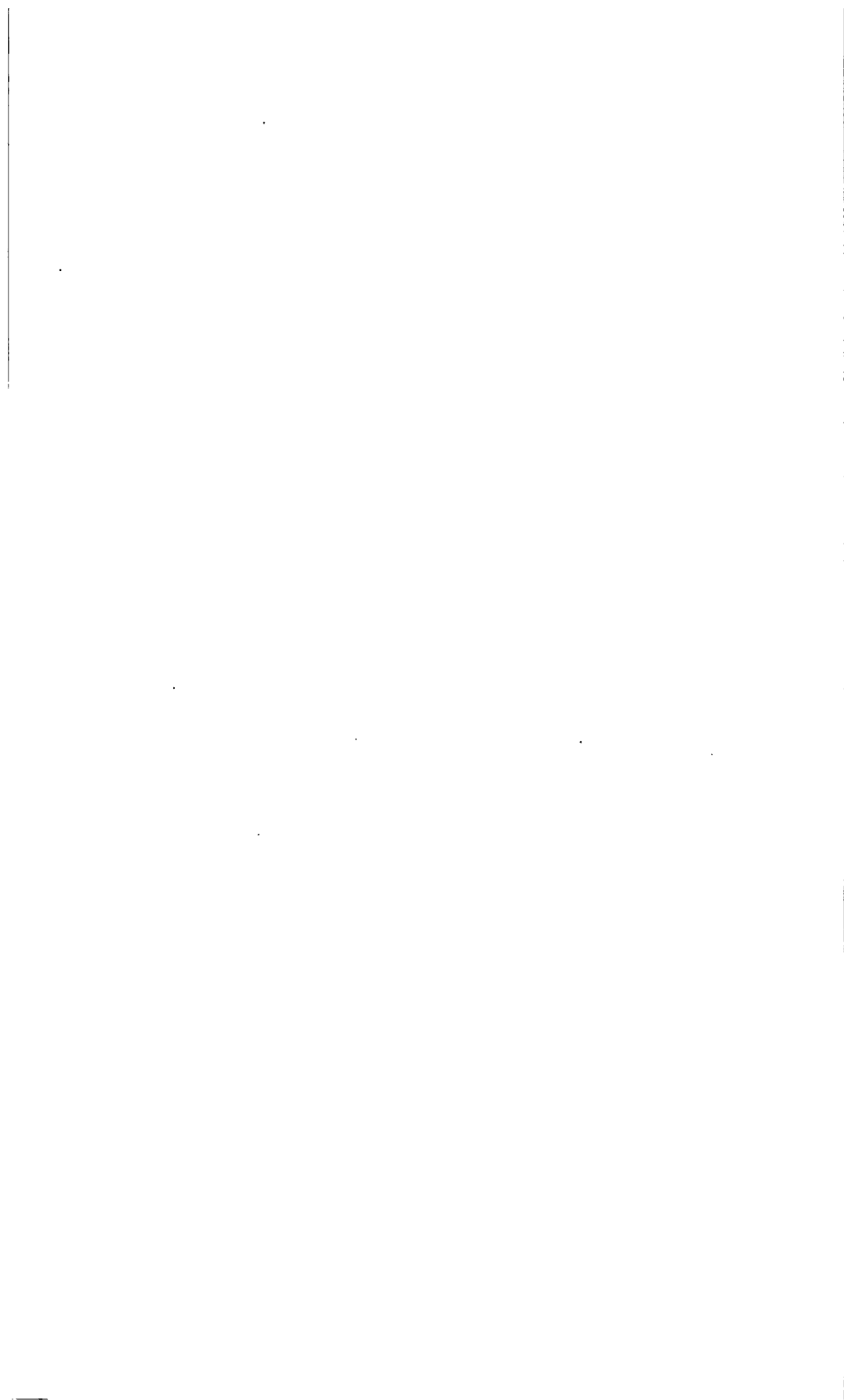
§ 655. Liability for Price of Adulterated Food Sold as Pure Food.

A purchaser can not be compelled to accept nor pay damages for nonacceptance of an article of food so adulterated as to come within the provisions of a State statute prohibiting its sale, even though the adulterated article is equal to the standard specified in the contract.¹

Smith v. Alphin, 150 N. C. 425, 110 E. 210.

Crossman v. Lurman, 192 U. S. 24 Sup. Ct. 234, 48 L. Ed. affirming 171 N. Y. 329, 83 N. Y. 1097. In this case it was held that a contract made in New York for the sale of goods to be delivered and stored in New York

on arrival from a foreign port is a New York contract governed by the laws of New York, even though its buyers be residents of another State. This was a sale of colored coffee. See a like holding in Boston Dairy Co. v. J. H. Jones Corporation (N. Y.), 129 N. Y. Supp. 70.



APPENDICES

APPENDIX A.

THE FOOD AND DRUGS ACT, JUNE 30, 1906.

[34 U. S. Stat. at Large 771; U. S. Comp. St. Supp. 1909, p. 1193.]

AN ACT for preventing the manufacture, sale, or transportation of adulterated or misbranded or poisonous or deleterious foods, drugs, medicines, and liquors, and for regulating traffic therein, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That it shall be unlawful any person to manufacture within any Territory or the District of Columbia any article of food or drug which is adulterated or misbranded, in the meaning of this Act; and any person who shall violate any of provisions of this section shall be guilty of a misdemeanor, and for offense shall, upon conviction thereof, be fined not to exceed five hundred dollars or shall be sentenced to one year's imprisonment, or both fine and imprisonment, in the discretion of the court, and for each subsequent offense and conviction thereof shall be fined not less than one hundred dollars or sentenced to one year's imprisonment, or both such fine and imprisonment, in the discretion of the court.

Sec. 2. That the introduction into any State or Territory or the District of Columbia from any other State or Territory or the District of Columbia, or from any foreign country, or shipment to any foreign country of any article of food or drugs which is adulterated or misbranded within the meaning of this Act, is hereby prohibited; and any person who shall ship or deliver for shipment from any State or Territory or the District of Columbia to any other State or Territory or the District of Columbia, or to a foreign country, or who shall receive in any State or Territory or the District of Columbia, or foreign country, and having received, shall deliver, in original packages, for pay or otherwise, or deliver to any other person, any such article so adulterated or misbranded within the meaning of this Act, or any person who shall receive for sale in the District of Columbia or the Territories of the United States any such adulterated or misbranded foods or drugs, or who shall offer to export the same to any foreign country, shall be guilty of a misdemeanor, and for such offense be fined not exceeding two hundred dollars on the first offense, and upon conviction for each subsequent offense exceeding three hundred dollars or be imprisoned not exceeding one year, or both, in the discretion of the court: *Provided,* That no person shall be deemed misbranded or adulterated within the provisions of this Act when intended for export to any foreign country and prepared according to the specifications or directions of the foreign country, when no substance is used in the preparation or packing thereof

in conflict with the laws of the foreign country to which said article is intended to be shipped; but if said article shall be in fact sold or offered for sale for domestic use or consumption, then this proviso shall not exempt said article from the operation of any of the other provisions of this Act.

SEC. 3. That the Secretary of the Treasury, the Secretary of Agriculture, and the Secretary of Commerce and Labor shall make uniform rules and regulations for carrying out the provisions of this Act, including the collection and examination of specimens of foods and drugs manufactured or offered for sale in the District of Columbia, or any Territory of the United States, or which shall be offered for sale in unbroken packages in any State other than that in which they shall have been respectively manufactured or produced, or which shall be received from any foreign country, or intended for shipment to any foreign country, or which may be submitted for examination by the chief health, food, or drug officer of any State, Territory, or the District of Columbia, or at any domestic or foreign port through which such product is offered for interstate commerce, or for export or import between the United States and any foreign port or country.

SEC. 4. That the examinations of specimens or foods and drugs shall be made in the Bureau of Chemistry of the Department of Agriculture, or under the direction and supervision of such Bureau, for the purpose of determining from such examination whether such articles are adulterated or misbranded within the meaning of this Act; and if it shall appear from any such examination that any of such specimens is adulterated or misbranded within the meaning of this Act, the Secretary of Agriculture shall cause notice thereof to be given to the party from whom such sample was obtained. Any party so notified shall be given an opportunity to be heard, under such rules and regulations as may be prescribed as aforesaid, and if it appears that any of the provisions of this Act have been violated by such party, then the Secretary of Agriculture shall at once certify the facts to the proper United States district attorney, with a copy of the results of the analysis or the examination of such article duly authenticated by the analyst or officer making such examination, under the oath of such officer. After judgment of the court, notice shall be given by publication in such manner as may be prescribed by the rules and regulations aforesaid.

SEC. 5. That it shall be the duty of each district attorney to whom the Secretary of Agriculture shall report any violation of this Act, or to whom any health or food or drug officer or agent of any State, Territory, or the District of Columbia shall present satisfactory evidence of any such violation, to cause appropriate proceedings to be commenced and prosecuted in the proper courts of the United States, without delay, for the enforcement of the penalties as in such case herein provided.

SEC. 6. That the term "drug," as used in this Act, shall include all medicines and preparations recognized in the United States Pharmacopoeia.

poeia or National Formulary for internal or external use, and any substance or mixture of substances intended to be used for the cure, mitigation, or prevention of disease of either man or other animals. The term "food," as used herein, shall include all articles used for food, drink, confectionery, or condiment by man or other animals, whether simple, mixed, or compound.

SEC. 7. That for the purposes of this Act an article shall be deemed to be adulterated:

In case of drugs:

First. If, when a drug is sold under or by a name recognized in the United States Pharmacopoeia or National Formulary, it differs from the standard of strength, quality, or purity, as determined by the test laid down in the United States Pharmacopoeia or National Formulary official at the time of investigation: *Provided*, That no drug defined in the United States Pharmacopoeia or National Formulary shall be deemed to be adulterated under this provision if the standard of strength, quality, or purity be plainly stated upon the bottle, box, or other container of although the standard may differ from that determined by the standard laid down in the United States Pharmacopoeia or National Formulary. Second. If its strength or purity fall below the professed standard of quality under which it is sold.

In the case of confectionery:

It shall be deemed adulterated if it contain terra alba, barytes, talc, chrome yellow, or other mineral substance or poisonous color or flavor, or other ingredient deleterious or injurious to health, or any vinous, malt, or spirituous liquor or opium or narcotic drug.

In the case of food:

a. If any substance has been mixed and packed with it so as to adulterate or lower or injuriously affect its quality or strength.

b. If any substance has been substituted wholly or in part for the same.

c. If any valuable constituent of the article has been wholly or in part abstracted.

d. If it be mixed, colored, powdered, coated, or stained in a manner whereby damage or inferiority is concealed.

If it contain any added poisonous or other added deleterious substance which may render such article injurious to health: *Provided*, That in the preparation of food products for shipment they are not to be treated by any external application applied in such manner that the substance is necessarily removed mechanically, or by maceration in water, and directions for the removal of said preservative shall be printed on the covering or the package, the provisions of this Act shall not apply as applying only when said products are ready for con-

sumption if it consists in whole or in part of a filthy, decomposed, or putrid or vegetable substance, or any portion of an animal unfit

for food, whether manufactured or not, or if it is the product of a diseased animal, or one that has died otherwise than by slaughter.

SEC. 8. That the term "misbranded," as used herein, shall apply to all drugs, or articles of food, or articles which enter into the composition of food, the package or label of which shall bear any statement, design, or device regarding such article, or the ingredients or substances contained therein which shall be false or misleading in any particular, and to any food or drug product which is falsely branded as to the State, Territory, or country in which it is manufactured or produced.

That for the purposes of this Act an article shall also be deemed to be misbranded:

In case of drugs:

First. If it be an imitation of or offered for sale under the name of another article.

Second. If the contents of the package as originally put up shall have been removed, in whole or in part, and other contents shall have been placed in such package, or if the package fail to bear a statement on the label of the quantity or proportion of any alcohol, morphine, opium, cocaine, heroin, alpha or beta eucaine, chloroform, cannabis indica, chloral hydrate, or acetanilide, or any derivative or preparation of any such substances contained therein.

In the case of food:

First. If it be an imitation of or offered for sale under the distinctive name of another article.

Second. If it be labeled or branded so as to deceive or mislead the purchaser, or purport to be a foreign product when not so, or if the contents of the package as originally put up shall have been removed in whole or in part and other contents shall have been placed in such package, or if it fail to bear a statement on the label of the quantity or proportion of any morphine, opium, cocaine, heroin, alpha or beta eucaine, chloroform, cannabis indica, chloral hydrate, or acetanilide, or any derivative or preparation of any such substances contained therein.

Third. If in package form, and the contents are stated in terms of weight or measure, they are not plainly and correctly stated on the outside of the package.

Fourth. If the package containing it or its label shall bear any statement, design, or device regarding the ingredients or the substances contained therein, which statement, design, or device shall be false or misleading in any particular: *Provided*, That an article of food which does not contain any added poisonous or deleterious ingredients shall not be deemed to be adulterated or misbranded in the following cases:

First. In the case of mixtures or compounds which may be now or from time to time hereafter known as articles of food, under their own distinctive names, and not an imitation of or offered for sale under the distinctive name of another article, if the name be accompanied on the

same label or brand with a statement of the place where said article has been manufactured or produced.

Second. In the case of articles labeled, branded, or tagged so as to plainly indicate that they are compounds, imitations, or blends, and the word "compound," "imitation," or "blend," as the case may be, is plainly stated on the package in which it is offered for sale: *Provided*, That the term blend as used herein shall be construed to mean a mixture of like substances, not excluding harmless coloring or flavoring ingredients used for the purpose of coloring and flavoring only: *And provided further*, that nothing in this Act shall be construed as requiring or compelling proprietors or manufacturers of proprietary foods which contain no wholesome added ingredient to disclose their trade formulas, except insofar as the provisions of this Act may require to secure freedom from alteration or misbranding.

SEC. 9. That no dealer shall be prosecuted under the provisions of this Act when he can establish a guaranty signed by the wholesaler, importer, manufacturer, or other party residing in the United States, from whom he purchases such articles, to the effect that the same is not adulterated or misbranded within the meaning of this Act, designating its guaranty, to afford protection, shall contain the name and address of the party or parties making the sale of such articles to such dealer, and in such case said party or parties shall be amenable to the prosecution, fines, and other penalties which would attach, in due course, to a dealer under the provisions of this Act.

SEC. 10. That any article of food, drug, or liquor that is adulterated or misbranded within the meaning of this Act, and is being transported from one State, Territory, District, or insular possession to another for sale, having been transported, remains unloaded, unsold, or in original packages, or if it be sold or offered for sale in the District of Columbia or the Territories, or insular possessions of the United States, shall be imported from a foreign country for sale, or if it is intended to be exported to a foreign country, shall be liable to be proceeded against in the district court of the United States within the district where the article is found, and seized for confiscation by a process of libel for condemnation. And if such article is condemned as being adulterated or misbranded, or of a poisonous or deleterious character, within the meaning of this Act, the same shall be disposed of by destruction or sale, as the court may direct, and the proceeds thereof, if sold, less the legal charges, shall be paid into the Treasury of the United States, and no such goods shall not be sold in any jurisdiction contrary to the provisions of this Act or the laws of that jurisdiction: *Provided, however*, that the payment of the costs of such libel proceedings and the return and delivery of a good and sufficient bond to the effect that the same shall not be sold or otherwise disposed of contrary to the provisions of this Act, or the laws of any State, Territory, District, or insular possession, the court may by order direct that such articles be

delivered to the owner thereof. The proceedings of such libel cases shall conform, as near as may be, to the proceedings in admiralty, except that either party may demand trial by jury of any issue of fact joined in any such case, and all proceedings shall be at the suit of and in the name of the United States.

SEC. 11. The Secretary of the Treasury shall deliver to the Secretary of Agriculture, upon his request from time to time, samples of foods and drugs which are being imported into the United States or offered for import, giving notice thereof to the owner or consignee, who may appear before the Secretary of Agriculture, and have the right to introduce testimony, and if it appear from the examination of such samples that any article of food or drug offered to be imported into the United States is adulterated or misbranded within the meaning of this Act, or is otherwise dangerous to the health of the people of the United States, or is of a kind forbidden entry into, or forbidden to be sold or restricted in sale in the country in which it is made or from which it is exported, or is otherwise falsely labeled in any respect, the said article shall be refused admission, and the Secretary of the Treasury shall refuse delivery to the consignee and shall cause the destruction of any goods refused delivery which shall not be exported by the consignee within three months from the date of notice of such refusal under such regulations as the Secretary of the Treasury may prescribe: *Provided*, That the Secretary of the Treasury may deliver to the consignee such goods pending examination and decision in the matter on execution of a penal bond for the amount of the full invoice value of such goods, together with the duty thereon, and on refusal to return such goods for any cause to the custody of the Secretary of the Treasury, when demanded, for the purpose of excluding them from the country, or for any other purpose, said consignee shall forfeit the full amount of the bond: *And provided further*, That all charges for storage, cartage, and labor on goods which are refused admission or delivery shall be paid by the owner or consignee, and in default of such payment shall constitute a lien against any future importation made by such owner or consignee.

SEC. 12. That the term "Territory" as used in this Act shall include the insular possessions of the United States. The word "person" as used in this Act shall be construed to import both the plural and the singular, as the case demands, and shall include corporations, companies, societies and associations. When construing and enforcing the provisions of this Act, the act, omission, or failure of any officer, agent, or other person acting for or employed by any corporation, company, society, or association, within the scope of his employment or office, shall in every case be also deemed to be the act, omission, or failure of such corporation, company, society, or association as well as that of the person.

SEC. 13. That this Act shall be in force and effect from and after the first day of January, nineteen hundred and seven.

Approved, June 30, 1906.

APPENDIX B.**UNITED STATES DEPARTMENT OF AGRICULTURE.**

See of the Secretary—Circular No. 21, Third Revision.

Regulations 3, 17, 19, 28, and 34 as amended by F. I. D. 79, 12, and 93, issued October 16, 1907, February 10, 1908, January 910, and May 23, 1908, respectively; also Regulation 9, Section amended by F. I. D. 99, December 8, 1908, to take effect January 1, 1909, and Regulation 15 as amended to accord with F. I. D. 14.)

D REGULATIONS FOR THE ENFORCEMENT OF THE FOOD AND DRUGS ACT.¹

amendments since July 23, 1910 (the date to the introduction), and the amendments (Oct. 20, 1911) of going to press have been inserted in these regulations by the author.

INTRODUCTION.

On the date of October 17, 1906, forty rules and regulations for the enforcement of the Food and Drugs Act, June 30, 1906, were adopted. These include seven regulations, Nos. 3, 9, 15, 17, 19, 28, and 34, have been amended, the first named by F. I. D. 79, "Collection of Samples," by Secretary Wilson of the Department of Agriculture, Secretary of the Treasury Department, and Secretary Straus of the Department of Commerce and Labor, No. 9 by F. I. D. 99, "Change in Guaranty Legend," No. 15 to accord with F. I. D. 104, on Benzoate of Soda, Nos. 17 and 19 by F. I. D. 84, "Label" and "Character of Name," No. 28 by F. I. D. 112, on "Labeling of Derivatives," and No. 34 by F. I. D. 112, on "Labeling of Derivatives," all over the signatures of the Secretaries of Agriculture, Treasury, and Commerce and Labor.

Regulation 2, Original Unbroken Package, has been interpreted by the Department of Agriculture, and Regulation 9, Form of Guaranty, by F. I. D. 83, the latter ordered by the Attorney-General on the issue of a guaranty guaranty.

In accordance with Regulation 15, Wholesomeness of Colors and Preservatives, F. I. D. 76, on Dyes, Chemicals, and Preservatives in Foods, F. I. D. 76, to the use in Foods of Benzoate of Soda and Sulphur Dioxide, the Use of Copper Salts, and F. I. D. 102, amending F. I. D. 102, issued over the signatures of the three Secretaries, constitute on these points pending the completion of investigations the issuance of final regulations governing the use of such substances. This constitutes the final decision on the use of benzoate of soda and allows such use.

With the exception of these amendments and amplifications the regu-

lations as originally issued remain unchanged, and no additional rules have been adopted, the revision issued under this date merely incorporating the changes enumerated.

JAMES WILSON, Secretary of Agriculture.

Washington, D. C., July 23, 1910.

ORIGINAL LETTER OF TRANSMITTAL.

Washington, D. C., October 16, 1906.

The Secretaries of the Treasury, of Agriculture, and of Commerce and Labor.

Sirs: The Commission appointed to represent your several Departments in the formulation of uniform rules and regulations for the enforcement of the Food and Drugs Act, approved June 30, 1906, has reached a unanimous agreement and respectfully submits the results of its deliberations and recommends their adoption.

Very respectfully,

H. W. WILEY.

JAMES L. GERRY.

S. N. D. NORTH.

RULES AND REGULATIONS—GENERAL.

Regulation 1. Short Title of the Act.

The Act, "For preventing the manufacture, sale, or transportation of adulterated or misbranded or poisonous or deleterious foods, drugs, medicines, and liquors, and for regulating traffic therein, and for other purposes," approved June 30, 1906, shall be known and referred to as "The Food and Drugs Act, June 30, 1906."

Regulation 2. Original Unbroken Package.

[See also F. I. D. 86 for interpretation of this regulation.]

(Section 2.)

The term "original unbroken package" as used in this Act is the original package, carton, case, can, box, barrel, bottle, phial, or other receptacle put up by the manufacturer, to which the label is attached, or which may be suitable for the attachment of a label, making one complete package of the food or drug article. The original package contemplated includes both the wholesale and the retail package.

Regulation 3. Collection of Samples.

added by F. I. D. 79, October 8, 1907, to take effect November 1, 1907.]

(Section 4.)

Goods of unbroken packages shall be collected only by authorized agents of the Department of Agriculture, or by the health, food, or drug inspectors of any State, Territory, or the District of Columbia, when authorized by the Secretary of Agriculture for this purpose.

Goods may be purchased in the open market, and, if in bulk, the weights, and, or tags upon the package, carton, container, wrapper, or other thing printed or written matter shall be noted. The collector shall note the names of the vendor and agent through whom the sale was made, together with the date of the purchase. The collector shall purchase representative samples.

A sample taken from bulk goods shall be divided into three parts, each shall be labeled with the identifying marks.

A package shall be less than four pounds, or in volume less than two cubic feet. Three packages shall be purchased, when practicable, and the weights and tags upon each noted as above. When three samples are purchased, one sample shall be delivered to the Bureau of Chemistry or to the health or food inspector or examiner as may be designated by the Secretary of Agriculture; the second and third samples shall be held under seal by the Department of Agriculture, who, upon request, shall deliver one of such samples to the party from whom purchased or to the party guaranteeing the goods.

If it is impracticable to collect three samples, or to divide the samples, the order of delivery outlined above shall obtain, and where there is a second sample the Secretary of Agriculture may, at his discretion, deliver such sample to parties interested.

Samples shall be sealed by the collector with a seal provided for

Regulation 4. Method of Analysis.**(Section 4.)**

Unless otherwise directed by the Secretary of Agriculture, the methods employed shall be those prescribed by the Association of Official Agricultural Chemists and the United States Pharmacopoeia.

Regulation 5. Hearings.

[As amended to accord with F. I. D. 130.]

(Section 4.)

(a) When the examination or analysis shows that samples are adulterated or misbranded within the meaning of this Act notice of that fact shall be given in every case to the party or parties against whom prosecution lies under this Act for the shipment or manufacture or sale of the particular product and such other interested parties as the Secretary of Agriculture may direct, and a date shall be fixed at which such party or parties may be heard before the Secretary of Agriculture or such other person as he may direct. The hearings shall be had at places designated by the Secretary of Agriculture most convenient for all parties concerned. These hearings shall be private and confined to questions of fact. The parties interested therein may appear in person or by attorney and may submit oral or written evidence to show any fault or error in the findings of the analyst or examiner. Interested parties may present proper interrogatories to analysts, to be submitted to and propounded by the Secretary of Agriculture or the officer conducting the hearing. Such privilege, however, shall not include the right of cross-examination. The Secretary of Agriculture may order a reexamination of the sample or have new samples drawn for further examination.

(b) If, after hearings held, it appears that a violation of the Act has been committed, the Secretary of Agriculture shall give notice to the proper United States attorney.

(c) Any health food, or drug officer or agent of any State, Territory, or the District of Columbia who shall obtain satisfactory evidence of any violation of the Food and Drugs Act, June 30, 1906, as provided by Section 5 thereof, shall first submit the same to the Secretary of Agriculture in order that he may give notice and fix dates for hearings to the proper parties.

Regulation 6. Publication.

(Section 4.)

(a) When a judgment of the court shall have been rendered there may be a publication of the findings of the examiner or analyst, together with the findings of the court.

(b) This publication may be made in the form of circulars, notices, or bulletins, as the Secretary of Agriculture may direct, not less than thirty days after judgment.

(c) If an appeal be taken from the judgment of the court before such publication, notice of the appeal shall accompany the publication.

Regulation 7. Standards for Drugs.

(Section 7.)

drug bearing a name recognized in the United States Pharmacopoeia or National Formulary, without any further statement respecting strength, quality, and the standards prescribed or indicated for a drug of the same name at the time.

drug bearing a name recognized in the United States Pharmacopoeia or National Formulary, and branded to show a different standard of quality, or purity, shall not be regarded as adulterated if it meets its declared standard.

Regulation 8. Formulas—Proprietary Foods.

(Section 8, last paragraph.)

Manufacturers of proprietary foods are only required to state the names and percentages of the materials used, in so far as the Secretary of Agriculture may find this to be necessary to protect the public from adulteration and misbranding.

Factories in which proprietary foods are made shall be open at all reasonable times to the inspection provided for in Regulation 16.

Regulation 9. Form of Guaranty.

December 8, 1908, by F. I. D. 99, to take effect on January 1, 1909; see also F. I. D. 83 for opinion of the Attorney-General on the validity of a guaranty based upon a former guaranty.]

(Section 9.)

Dealer in food or drug products will be liable to prosecution to establish that the goods were sold under a guaranty by the manufacturer, jobber, dealer, or other party residing in the State from whom purchased.

A guaranty may be filed with the Secretary of Agriculture by the manufacturer or dealer and be given a serial number, which shall appear on each and every package of goods sold under such guaranty with the words "Guaranteed by [insert the name of guarantor] under the Food and Drugs Act, June 30, 1906."

Following form of guaranty is suggested:

I, the undersigned, do hereby guarantee that the articles of drugs manufactured, packed, distributed, or sold by me (naming the same as fully as possible) are not adulterated.

ated or misbranded within the meaning of the Food and Drugs Act, June 30, 1906.

(Signed in ink.)

[Name and place of business of wholesaler, dealer, manufacturer, jobber, or other party.]

(d) If the guaranty be not filed with the Secretary of Agriculture as above, it should identify and be attached to the bill of sale, invoice, bill of lading, or other schedule giving the names and quantities of the articles sold.

ADULTERATION.

Regulation 10. Confectionery.

(Section 7.)

(a) Mineral substances of all kinds (except as provided in Regulation 15) are specifically forbidden in confectionery whether they be poisonous or not.

(b) Only harmless colors or flavors shall be added to confectionery.

(c) The term "narcotic drugs" includes all the drugs mentioned in Section 8, Food and Drugs Act, June 30, 1906, relating to foods, their derivatives and preparations, and all other drugs of a narcotic nature.

Regulation 11. Substances Mixed and Packed with Foods.

(Section 7, under "Foods.")

No substance may be mixed or packed with a food product which will reduce or lower its quality or strength. Not excluded under this provision are substances properly used in the preparation of food products for clarification or refining, and eliminated in the further process of manufacture.

Regulation 12. Coloring, Powdering, Coating, and Staining.

(Section 7, under "Foods".)

(a) Only harmless colors may be used in food products.

(b) The reduction of a substance to a powder to conceal the inferiority in character is prohibited.

(c) The term "powdered" means the application of any powdered substance to the exterior portion of articles of food, or the reduction of a substance to a powder.

(d) The term "coated" means the application of any substance to the exterior portion of a food product.

term "stain" includes any change produced by the addition of color to the exterior portion of foods which in any way alters the natural tint.

Section 13. Natural Poisonous or Deleterious Ingredients.

(Section 7, paragraph 5, under "Foods.")

Any food product which contains naturally a poisonous or deleterious substance shall not come within the provisions of the Food and Drugs Act, 1906, except when the presence of such ingredient is due to natural occurrence, or decomposition.

Section 14. External Application of Preservatives.

(Section 7, paragraph 5, under "Foods," proviso.)

Preservatives or deleterious preservatives shall only be applied to food products if they and the food products shall be of a character which does not permit the permeation of any of the preservative to the interior, or to the interior, of the product.

If these products are ready for consumption, if any portion of the preservative shall have penetrated the food product, then the food products shall not obtain the approval of the Secretary of Agriculture under Section 7, paragraph 5, under "Foods," shall not obtain approval, and the products shall then be subject to the regulations for food adulteration.

Any preservative applied must be of such a character that, until the food products are inedible.

Section 15. Wholesomeness of Colors and Preservatives.

In accordance with F. I. D. 104. See also F. I. D. 76, 89, 92, 102 for rulings under this head.]

(Section 7, paragraph 5, under "Foods.")

In determining the wholesomeness of colors, preservatives, and other substances which are added to foods, the Secretary of Agriculture shall require a chemical or other examination, under the authority of the Food and Drug Appropriation Act, Public 382, approved June 30, 1906, of those substances which are permitted or inhibited in food products. Such findings, when approved by the Secretary of the Interior, the Secretary of Commerce and Labor, shall become a part of the regulations.

The Secretary of Agriculture shall determine from time to time, with the authority conferred by the agricultural appropriation Act, Public 382, approved June 30, 1906, the principles which shall govern the use of colors, preservatives, and other substances added to

foods; and when concurred in by the Secretary of the Treasury and the Secretary of Commerce and Labor, the principles so established shall become a part of these regulations.

(c) It having been determined that benzoate of soda mixed with food is not deleterious or poisonous and is not injurious to health, no objection will be raised under the food and drugs Act to the use in food of benzoate of soda, provided that each container or package of such food is plainly labeled to show the presence and amount of benzoate of soda. Food Inspection Decisions 76 and 89 are amended accordingly.

Regulation 16. Character of the Raw Materials.

(Section 7, paragraph 1, under "Drugs;" paragraph 6, under "Foods.")

(a) The Secretary of Agriculture, when he deems it necessary, shall examine the raw materials used in the manufacture of food and drug products, and determine whether any filthy, decomposed, or putrid substance is used in their preparation.

(b) The Secretary of Agriculture shall make such inspections as often as he may deem necessary.

MISBRANDING.

Regulation 17. Label.

[As amended by F. I. D. 84. January 31, 1908, taking effect February 10, 1908.]

(Section 8.)

(a) The term "label" applies to any printed, pictorial or other matter upon or attached to any package of a food or drug product, or any container thereof subject to the provisions of this Act.

(b) The principal label shall consist, first, of all information which the Food and Drugs Act, June 30, 1906, specifically requires, to wit, the name of the place of manufacture in the case of food compounds or mixtures sold under a distinctive name; statements which show that the articles are compounds, mixtures, or blends; the words "compound," "mixture," or "blend," and words designating substances or their derivatives and proportions required to be named in the case of foods and drugs. All this information shall appear upon the principal label, and should have no intervening descriptive or explanatory reading matter. Second, if the name of the manufacturer and place of manufacture are given, they should also appear upon the principal label. Third, preferably upon the principal label, in conjunction with the name of the substance, such phrases as "artificially colored," "colored with sulphate of copper," or any other such descriptive phrases necessary to be announced should be conspicuously displayed. Fourth, elsewhere upon the principal label other matter may appear in the discretion of the manufacturer. If the

are stated in terms of weight or measure, such statement should appear upon the principal label and must be couched in plain terms, as by Regulation 29.

If the principal label is in a foreign language, all information by law and such other information as indicated above in (b) appear upon it in English. Besides the principal label in the case of the country of production, there may be also one or more labels, if desired, in other languages, but none of them more prominent than the principal label, and these other labels must bear the information required by law, but not necessarily in English. The size of the type to declare the information required by the Act shall not be less than an eight-point (brevier) capitals: *Provided*, That in case the packaging of the article will not permit the use of eight-point type, the size may be reduced proportionately.

The descriptive matter upon the label shall be free from any statement, or device regarding the article or the ingredients or substances contained therein, or quality thereof, or place or origin, which is misleading in any particular. The term "design" or "device" includes pictorial matter of every description, and to abbreviations, or signs for weights, measures, or names of substances.

An article containing more than one food product or active ingredient is misbranded if named after a single constituent.

The case of drugs the nomenclature employed by the United States Pharmacopoeia and the National Formulary shall obtain.

The use of any false or misleading statement, design, or device in any part of the label shall not be justified by any statement as to the opinion of an expert or other person, nor by any statement explaining the use of the false or misleading statement as to the opinion of an expert or other person, nor by any statement explaining the use of the false or misleading statement, or device.

Regulation 18. Name and Address of Manufacturer.

(Section 8.)

The name of the manufacturer or producer, or the place where the article is manufactured, except in case of mixtures and compounds having a distinctive name, need not be given upon the label, but if given, must be given in full, and the true place. The words "packed for ———," or "by ———," or some equivalent phrase, shall be added to the label. The name which appears upon the label is not that of the manufacturer or producer, or the name of the place not the place of manufacture or production.

When a person, firm, or corporation actually manufactures or packages an article of food or drug in two or more places, the actual

place of manufacture or production of each particular package need not be stated on the label except in the opinion of the Secretary of Agriculture the mention of any such place, to the exclusion of the others, misleads the public.

Regulation 19. Character of Name.

[As amended by F. I. D. 84, January 31, 1908, taking effect February 10, 1908.]

(Section 8.)

(a) A simple or unmixed food or drug product not bearing a distinctive name should be designated by its common name in the English language; or if a drug, by any name recognized in the United States Pharmacopoeia or National Formulary. No further description of the components or qualities is required, except as to content of alcohol, morphine, etc.

(b) The use of a geographical name shall not be permitted in connection with a food or drug product not manufactured or produced in that place, when such name indicates that the article was manufactured or produced in that place.

(c) The use of a geographical name in connection with a food or drug product will not be deemed a misbranding when by reason of long usage it has come to represent a generic term and is used to indicate a style, type, or brand; but in all such cases the State or Territory where any such article is manufactured or produced shall be stated upon the principal label.

(d) A foreign name which is recognized as distinctive of a product of a foreign country shall not be used upon an article of domestic origin except as an indication of the type or style of quality or manufacture, and then only when so qualified that it can not be offered for sale under the name of a foreign article.

Regulation 20. Distinctive Name.

(Section 8.)

(a) A "distinctive name" is a trade, arbitrary, or fancy name which clearly distinguishes a food product, mixture, or compound from any other food product, mixture, or compound.

(b) A distinctive name shall not be one representing any single constituent of a mixture or compound.

(c) A distinctive name shall not misrepresent any property or quality of a mixture or compound.

(d) A distinctive name shall give no false indication of origin, character, or place of manufacture, nor lead the purchaser to suppose that it is any other food or drug product.

**Regulation 21. Compounds, Imitations, or Blends Without
Distinctive Name.**

(Section 8.)

The term "blend" applies to a mixture of like substances, not harmless coloring or flavoring ingredients used for the pur-
posing and flavoring only.

Any age is stated, it shall not be that of a single one of its
s, but shall be the average of all constituents in their respec-
tions.

Coloring and flavoring can not be used for increasing the weight
a blend.

In order that colors or flavors may not increase the volume or
a blend, they are not to be used in quantities exceeding one
hundred pounds of the blend.

Color or flavor can not be employed to imitate any natural
any other product of recognized name and quality.

The term "imitation" applies to any mixture or compound which
feits or fraudulent simulation of any article of food or drug.

Regulation 22. Articles without a Label.

Paragraph 1, under "Drugs;" paragraph 1, under "Foods.")
Prohibited to sell or offer for sale a food or drug product bear-
ing upon the package or no descriptive matter whatever con-
taining it, either by design, device, or otherwise, if said product be
not offered for sale under the name of another article.

Regulation 23. Proper Branding not a Complete Guaranty.

Labels which are correctly branded as to character of contents,
manufacture, name of manufacturer, or otherwise, may be adul-
terated and hence not entitled to enter into interstate commerce.

Regulation 24. Incompleteness of Branding.

A product shall be deemed misbranded if the label be incomplete
in names of the required ingredients. A simple product does not
require further statement than the name or distinctive name thereof,
provided in Regulation 19 (a) and 28.

Regulation 25. Substitution.

(Sections 7 and 8.)

When a substance of a recognized quality commonly used in the
preparation of a food or drug product is replaced by another substance

not injurious or deleterious to health, the name of the substituted substance shall appear upon the label.

(b) When any substance which does not reduce, lower, or injuriously affect its quality or strength, is added to a food or drug product, other than that necessary to its manufacture or refining, the label shall bear a statement to that effect.

Regulation 26. Waste Materials.

(Section 8.)

When an article is made up of refuse materials, fragments, or trimmings, the use of the name of the substance from which they are derived, unless accompanied by a statement to that effect, shall be deemed a misbranding. Packages of such materials may be labeled "pieces," "stems," "trimmings," or with some similar appellation.

Regulation 27. Mixtures of Compounds with Distinctive Names.

(Section 8. First proviso under "Foods," paragraph 1.)

(a) The terms "mixtures" and "compounds" are interchangeable and indicate the results of putting together two or more food products.

(b) These mixtures or compounds shall not be imitations of other articles, whether simple, mixt, or compound, or offered for sale under the name of other articles. They shall bear a distinctive name and the name of the place where the mixture or compound has been manufactured or produced.

(c) If the name of the place be one which is found in different States, Territories, or countries, the name of the State, Territory, or country, as well as the name of the place, must be stated.

Regulation 28. Substances named in Drugs or Foods.

[As amended by F. I. D. 112, January 6, 1910, taking effect April 1, 1910.]

(Section 8. Second under "Drugs;" second under "Foods.")

(a) The term "alcohol" is defined to mean common or ethyl alcohol. No other kind of alcohol is permissible in the manufacture of drugs except as specified in the United States Pharmacopoeia or National Formulary.

(b) The words alcohol, morphine, opium, etc., and the quantities and proportions thereof, shall be printed in letters corresponding in size with those prescribed in Regulation 17, paragraph (c).

(c) A drug, or food product except in respect of alcohol, is misbranded in case it fails to bear a statement on the label of the quantity or proportion of any alcohol, morphine, opium, heroin, cocaine, alpha or beta eucaine, chloroform, cannabis indica, chloral hydrate, or acetanilide, or any derivative or preparation of any such substances contained therein.

A statement of the maximum quantity or proportion of any substances present will meet the requirements, provided the maximum does not vary materially from the average quantity or proportion.

In case the actual quantity or proportion is stated it shall be the same quantity or proportion with the variations noted in Regulations.

The following are the principal derivatives and preparations made from the articles which are required to be named upon the label:

ETHYL: (Cologne spirits, grain alcohol, rectified spirits, spirits, and spirits of wine.)

Derivatives—

ethyl ether, ethyl acetate, ethyl nitrite, and paraldehyde.

Preparations containing alcohol—

brandy, brandies, cordials, elixirs, essences, fluid-extracts, spirits, syrups, tinctures, tonics, whiskies, and wines.

ALKALOID:

Derivatives—

morphine, dionine, peronine, morphine acetate, hydrochloride, sulphate, and other salts of morphine.

Preparations containing morphine or derivatives of morphine—

elixirs, catarrh snuff, chlorodyne, compound powder of morphine, capsules, elixirs, granules, pills, solutions, syrups, suppositories, tablets, triturates, and troches.

OP:

Preparations of Opium—

extracts, denarcotized opium, granulated opium, and powdered opium, bougies, brown mixture, carminative mixtures, crayons, Dover's powder, elixirs, liniments, ointments, paregoric, pills, syrups, suppositories, tablets, tinctures, troches, vinegars, and wines.

Derivatives—

codeine, alkaloid, hydrochloride, phosphate, sulphate, and other salts of codeine.

Preparations containing codeine or its salts—

elixirs, pills, syrups, and tablets.

COCAINE:

Derivatives—

cocaine hydrochloride, oleate, and other salts.

Preparations containing cocaine or salts of cocaine—

leaves, catarrh powders, elixirs, extracts, infusion of coca, ointments, paste pencils, pills, solutions, syrups, tablets, tinctures, troches, and wines.

HEROIN:

Preparations containing heroin—
Syrups, elixirs, pills, and tablets.

ALPHA AND BETA EUCAINE:

Preparations—
Mixtures, ointments, powders, and solutions.

CHLOROFORM:

Preparations containing chloroform—
Chloranodyne, elixirs, emulsions, liniments, mixtures, spirits, and
syrups.

CANNABIS INDICA:

Preparations of cannabis indica—
Cann remedies, extracts, mixtures, pills, powders, tablets, and tinctures.

CHLORAL HYDRATE (Chloral, U. S. Pharmacopoeia, 1890):**Derivatives—**

Chloral acetophenoxim, chloral alcoholate, chloralamide, chloralimide, chloral othoform, chloralose, dormiol, hypnal, and uraline.
Preparations containing chloral hydrate or its derivatives—
Chloral camphorate, elixirs, liniments, mixtures, ointments, suppositories, syrups, and tablets.

ACETANILIDE (Antifebrine, Phenylacetamide):**Derivatives—**

Acetphenetidine, citrophen, diacetanilide, lactophenin, methoxyacetanilide, methylacetanilide, para-iodoacetanilide, and phenacetine.
Preparations containing acetanilide or derivatives—
Analgesics, antineuralgics, antirheumatics, cachets, capsules, cold remedies, elixirs, granular effervescent salts, headache powders, mixtures, pain remedies, pills, and tablets.

(g) In declaring the quantity or proportion of any of the specified substances the names by which they are designated in the Act shall be used, and in declaring the quantity or proportion of derivatives of any of the specified substances, in addition to the trade name of the derivative, the name of the specified substance shall also be stated, so as to indicate clearly that the product is a derivative of the particular specified substance.

Regulation 29. Statement of Weight or Measure.

(Section 8. Third under "Foods.")

(a) A statement of the weight or measure of the food contained in a package is not required. If any such statement is printed, it shall be

and correct statement of the average net weight or volume, either immediately above or below the principal label, and of the size of the label, as required in Regulation 17.

A reasonable variation from the stated weight for individual packages is permissible, provided this variation is as often above as below the weight or volume stated. This variation shall be determined by the amount of the changes in the humidity of the atmosphere, from the time the package is filled to evaporation or to absorption of water, and the variations which attend the filling and weighing or measuring of the package.

Regulation 30. Method of Stating Quantity or Proportion.

(Section 8.)

In the case of alcohol, the expression "quantity" or "proportion" shall mean the average percentage by volume in the finished product. In the case of the other ingredients required to be named upon the label, the expression "quantity" or "proportion" shall mean grains or ounces or fluid ounce, and also, if desired, the metric equivalent, or milligrams per gram or per cubic centimeter, or grams per cubic centimeter per kilogram or per liter; provided that these articles shall be deemed misbranded if the maximum of quantity or proportion is not stated, as required in Regulation 28 (d).

EXPORTS AND IMPORTS OF FOODS AND DRUGS.

Regulation 31. Preparation of Food Products for Export.

(Section 2.)

Food products intended for export may contain added substances which are not added in foods intended for interstate commerce, when the addition of such substances does not conflict with the laws of the countries to which the products are to be exported and when such substances are added in accordance with the directions of the foreign purchaser or his agent. The exporter is not required to furnish evidence that goods have been added or packed in compliance with the laws of the foreign country, but such goods are intended to be shipped, but such shipment is at the exporter's own risk.

Food products for export under this regulation shall be kept in separate packages and labeled to indicate that they are for export.

If the products are not exported they shall not be allowed to enter interstate commerce.

Regulation 32. Imported Food and Drug Products.

(Section 11.)

(a) Meat and meat food products imported into the United States shall be accompanied by a certificate of official inspection of a character to satisfy the Secretary of Agriculture that they are not dangerous to health, and each package of such articles shall bear a label which shall identify it as covered by the certificate, which certificate shall accompany or be attached to the invoice on which entry is made.

(b) The certificate shall set forth the official position of the inspector and the character of the inspection.

(c) Meat and meat food products as well as all other food and drug products of a kind forbidden entry into or forbidden to be sold, or restricted in sale in the country in which made or from which exported, will be refused admission.

(d) Meat and meat food products which have been inspected and past through the customs may, if identity is retained, be transported in interstate commerce.

Regulation 33. Declaration.

(Section 11.)

(a) All invoices of food or drug products shipped to the United States shall have attached to them a declaration of the shipper, made before a United States consular officer, as follows:

I, the undersigned, do solemnly and truly declare that I am the of the merchandise herein mentioned and described, (Manufacturer, agent, or shipper.) and that it consists of food or drug products which contain no added substances injurious to health.

These products were grown in and manufactured in (Country.)

..... by during the year....., and are exported (Country.) (Name of manufacturer.)

from and consigned to The products bear no false (City.) (City.)

labels or marks, contain no added coloring matter or preservative

....., and are not of a character to cause prohibition or (Name of added color or preservative.)

restriction in the country where made or from which exported.

Dated at this day of, 19 ...

(Signed):

(b) In the case of importations to be entered at New York, Boston, Philadelphia, Chicago, San Francisco, and New Orleans, and other ports

and drug inspection laboratories shall be established, this shall be attached to the invoice on which entry is made. The declaration shall be attached to the copy of the invoice Bureau of Chemistry.

Regulation 34. Denaturing.

[As amended by F. I. D. 93, May 12, 1908.]

(Section 11.)

otherwise declared on the invoice, all substances ordinarily used as food products intended for technical purposes should be accompanied by a declaration stating that fact. Such products should be released before entry, but denaturing may be allowed under customs regulations with the consent of the Secretary of the Treasury, or the Secretary of the Treasury may release such products without denaturing, under conditions as may preclude the possibility of their use as adulterants.

Regulation 35. Bond, Imported Foods, and Drugs.

(Section 11.)

Sealed packages of food and drug products may be delivered to the consignee prior to the completion of the examination to determine if the same are adulterated or misbranded upon the execution of a bond by the consignee in the sum of the invoice value of such goods plus duty added, for the return of the goods to customs custody.

Regulation 36. Notification of Violation of the Law.

(Section 11.)

If a sample on analysis or examination be found not to comply with the law, the importer shall be notified of the nature of the violation, the place at which final action will be taken upon the question of the shipment, and that he may be present, and submit evidence (Form No. 5). which evidence, with a sample of the article, shall be forwarded to the Bureau of Chemistry at Washington, accompanied by an appropriate report card.

Regulation 37. Appeal to the Secretary of Agriculture and Remuneration.

(Section 11.)

Applications for relief from decisions arising under the execution of the law should be addressed to the Secretary of Agriculture, and all

vouchers or accounts for remuneration for samples shall be filed with the chief of the inspection laboratory, who shall forward the same, with his recommendation, to the Department of Agriculture for action.

Regulation 38. Shipment beyond the Jurisdiction of the United States.

(Section 11.)

The time allowed the importer for representations regarding the shipment may be extended at his request to permit him to secure such evidence as he desires, provided that this extension of time does not entail any expense to the Department of Agriculture. If at the expiration of this time, in view of the data secured in inspecting the sample and such evidence as may have been submitted by the manufacturers or importers, it appears that the shipment can not be legally imported into the United States, the Secretary of Agriculture shall request the Secretary of the Treasury to refuse to deliver the shipment in question to the consignee, and to require its reshipment beyond the jurisdiction of the United States.

Regulation 39. Application of Regulations.

These regulations shall not apply to domestic meat and meat food products which are prepared, transported, or sold in interstate or foreign commerce under the meat-inspection law and the regulations of the Secretary of Agriculture made thereunder.

Regulation 40. Alteration and Amendment of Regulations.

These regulations may be altered or amended at any time, without previous notice, with the concurrence of the Secretary of the Treasury, the Secretary of Agriculture, and the Secretary of Commerce and Labor.

The above rules and regulations are hereby adopted.

LESLIE M. SHAW,

Secretary of the Treasury.

JAMES WILSON,

Secretary of Agriculture.

VICTOR H. METCALF,

Secretary of Commerce and Labor.

Washington, D. C., October 17, 1906.

APPENDIX C.**FILLED CHEESE.**

defining cheese, and also imposing a tax upon and regulating manufacture, sale, importation, and exportation of "filled cheese."

Act of June 6, 1896, ch. 337, 29 U. S. Stat. at Large. 253.]

Section 1. Cheese Defined.

for the purposes of this Act, the word "cheese" shall be understood to mean the food product known as cheese, and which is made from cream and without the addition of butter, or any animal, vegetable oils or fats foreign to such milk or cream, with or without coloring matter. (29 U. S. Stat. at Large 253.)

Section 2. Filled Cheese Defined.

for the purposes of this Act certain substances and compounds known and designated as "filled cheese," namely: All substance made of milk or skimmed milk, with the admixture of butter, or oils or fats, vegetable or any other oils, or compounds foreign to milk, and made in imitation or semblance of cheese. (29 U. S. Stat. at Large 253.)

Section 3. Special Taxes—Wholesaler—Retailer.

Special taxes are imposed as follows:

Manufacturers of filled cheese shall pay four hundred dollars for every factory per annum. Every person, firm, or corporation manufacturing filled cheese for sale shall be deemed a manufacturer of filled cheese.

Wholesale dealers in filled cheese shall pay two hundred and fifty dollars per annum. Every person, firm, or corporation who sells or offers for sale filled cheese in the original manufacturer's packages for resale, or dealers as hereinafter defined, shall be deemed a wholesale dealer in filled cheese.

Any manufacturer of filled cheese, who has given the required stamp, paid the required special tax, and who sells only filled cheese for production, at the place of manufacture, in the original packages in which the tax-paid stamps are affixed, shall not be required to pay a special tax of a wholesale dealer in filled cheese on account of

Wholesale dealers in filled cheese shall pay twelve dollars per annum. Retailers, who sell filled cheese at retail, not for resale, and for

actual consumption, shall be regarded as a retail dealer in filled cheese, and Sections 3232, 3233, 3234, 3235, 3236, 3237, 3238, 3239, 3240, 3241, 3243 of the Revised Statutes of the United States are, so far as applicable, made to extend to and include and apply to the special taxes imposed by this section and to the persons, firms, or corporations upon whom they are imposed:

Provided, That all special taxes under this Act shall become due on the first day of July in every year, or on commencing any manufacture, trade, or business on which said tax is imposed. In the latter case the tax shall be reckoned proportionately from the first day of the month in which the liability to the special tax commences to the first day of July following. (29 U. S. Stat. at Large 253.)

Section 4. Penalties.

That every person, firm, or corporation who carries on the business of a manufacturer of filled cheese without having paid the special tax therefor, as required by law, shall, besides being liable to the payment of the tax, be fined not less than four hundred dollars and not more than three thousand dollars; and every person, firm or corporation who carries on the business of a wholesale dealer in filled cheese without having paid the special tax therefor, as required by law, shall, besides being liable to the payment of the tax, be fined not less than two hundred and fifty dollars nor more than one thousand dollars; and every person, firm, or corporation who carries on the business of a retail dealer in filled cheese without having paid the special tax therefor, as required by law, shall, besides being liable for the payment of the tax, be fined not less than forty nor more than five hundred dollars for each and every offense. (29 U. S. Stat. at Large 254.)

Section 5. Regulations—Bond—Penalty.

That every manufacturer of filled cheese shall file with the collector of internal revenue of the district in which his manufactory is located such notices, inventories, and bonds, shall keep such books and render such returns of materials and products, shall put up such signs and affix such number to his factory, and conduct his business under such surveillance of officers and agents as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may by regulation require. But the bond required of such manufacturer shall be with sureties satisfactory to the collector of internal revenue, and in a penal sum of not less than five thousand dollars; and the amount of said bond may be increased from time to time, and additional sureties required, at the discretion of the collector or under instructions of the Commissioner of Internal Revenue. Any manufacturer of filled cheese, who fails to comply with the provisions of this section or with the regulations herein author-

be deemed guilty of a misdemeanor and upon conviction thereof fined not less than five hundred nor more than one thousand 29 U. S. Stat. at Large 254.) Construed United States v. Bohl, 25; United States v. Green, 137 Fed. 179.

ction 6. Packages—Marks—Stamps—Brands—Penalty.

filled cheese shall be packed by the manufacturers in wooden only, not before used for that purpose, and marked, stamped, and with the words "filled cheese" in black-faced letters not less inches in length, in a circle in the center of the top and bottom ese; and in black-faced letters of not less than two inches in line from the top to the bottom of the cheese, on the side in s equidistant from each other; and the package containing e shall be marked in the same manner, and in the same number and in the same description of letters as above provided for the f the cheese; and all sales or consignments made by manufac-illed cheese to wholesale dealers in filled cheese or to exporters of e shall be in original stamped packages. Retail dealers in filled ill sell only from original stamped packages, and shall pack cheese when sold in suitable wooden or paper packages, which arked and branded in accordance with rules and regulations to ed by the Commissioner of Internal Revenue with the approval retary of the Treasury. Every person who knowingly sells or sell, or delivers or offers to deliver, filled cheese in any other in new wooden or paper packages, marked and branded as here-ovided and as above described, or who packs in any package es filled cheese in any manner contrary to law, or who falsely y package, or affixes a stamp on any package denoting a less : tax than that required by law, shall upon conviction thereof r each and every offense not less than fifty dollars and not more hundred dollars, be imprisoned not less than thirty days nor one year. (29 U. S. Stat. at Large 254.)

Section 7. Dealer's Sign.

all retail and wholesale dealers in filled cheese shall display, in ous place in his or their sales room, a sign bearing the words eese sold here" in black-faced letters not less than six inches upon a white ground, with the name and number of the revenue hich his or their business is conducted; and any wholesale or er in filled cheese who fails or neglects to comply with the pro- this section shall be deemed guilty of a misdemeanor, and shall ion thereof be fined for each and every offense not less than fifty d not more than two hundred dollars. (29 U. S. Stat. at .)

Section 8. Label.

That every manufacturer of filled cheese shall securely affix, by pasting on each package containing filled cheese manufactured by him, a label on which shall be printed, besides the number of the manufactory and the district and State in which it is situated, these words:

"Notice.—The manufacturer of the filled cheese herein contained has complied with all the requirements of the law. Every person is cautioned not to use either this package again or the stamp thereon again, nor to remove the contents of this package without destroying said stamp, under the penalty provided by law in such cases."

Every manufacturer of filled cheese, who neglects to affix such label to any package containing filled cheese made by him or sold or offered for sale by or for him, and every person who removes any such label so affixed from any such package, shall be fined fifty dollars for each package in respect to which such offense is committed. (29 U. S. Stat. at Large 255.)

Section 9. Tax on Manufacture—Stamps.

That upon all filled cheese which shall be manufactured there shall be assessed and collected a tax of one cent per pound, to be paid by the manufacturer thereof; and any fractional part of a pound in a package shall be taxed as a pound. The tax levied by this section shall be represented by coupon stamps; and the provisions of existing laws governing the engraving, issue, sale, accountability, effacement, and destruction of stamps relating to tobacco and snuff, as far as applicable, are hereby made to apply to stamps provided for by this section. (U. S. Stat. at Large 255.)

Section 10. Tax on Cheese Sold Unstamped.

That whenever any manufacturer of filled cheese sells or removes for sale or consumption any filled cheese upon which the tax is required to be paid by stamps, without paying such tax, it shall be the duty of the Commissioner of Internal Revenue, within a period of not more than two years after such sale or removal, on satisfactory proof, to estimate the amount of tax which has been omitted to be paid, and to make an assessment therefor and certify the same to the collector. The tax so assessed shall be in addition to the penalties imposed by law for such sale or removal. (29 U. S. Stat. at Large 255.)

Section 11. Imported Cheese—Tax.

That all filled cheese as herein defined imported from foreign countries shall, in addition to any import duty imposed on the same, pay an

revenue tax of eight cents per pound, such tax to be represented on stamps; and such imported filled cheese and the packages containing the same shall be stamped, marked, and branded, as in the case of cheese manufactured in the United States. (29 U. S. Stat. at Large 256.)

Section 12. Penalty for Purchasing Unstamped Cheese.

Whoever knowingly purchases or receives for sale any cheese which has not been branded or stamped according to law, or contained in packages not branded or marked according to law, shall be liable to a penalty of fifty dollars for each such offense. (29 U. S. Stat. at Large 256.)

13. Penalty for Purchasing of Manufacturer not Paying Tax.

Whoever knowingly purchases or receives for sale any cheese from any manufacturer or importer who has not paid the tax herein provided for shall be liable, for each offense, to a fine of one hundred dollars and to a forfeiture of all articles so purchased or received, or of the full value thereof. (29 U. S. Stat. at Large 256.)

Section 14. Destroying Stamps.

Whoever destroys or attempts to destroy any stamped package containing filled cheese, or who, when it shall be the duty of the person in whose hands the same is, to remove the stamps thereon; and any person who willfully neglects or refuses to do so shall, for each such offense, be fined not exceeding fifty dollars or imprisoned not less than ten days nor more than six months. (29 U. S. Stat. at Large 256.)

Section 15. Tests—Appeals.

The Commissioner of Internal Revenue is authorized to have recourse to scientific tests, and to decide whether any substances used in the manufacture of filled cheese contain ingredients deleterious to health. In case of doubt or contest, his decision in this class of cases may be appealed from to a board hereby constituted for the purpose, and composed of the Surgeon-General of the Army, the Surgeon-General of the Navy, and the Secretary of Agriculture, and the decision of this board shall be final in the premises. (29 U. S. Stat. at Large 256.)

Section 16. Forfeitures.

All packages of filled cheese subject to tax under this Act that are found without stamps or marks as herein provided, and all filled cheese intended for human consumption which contains ingredients adulterated or otherwise unfit for food—55.

judged as hereinbefore provided to be deleterious to the public health, shall be forfeited to the United States. (29 U. S. Stat. at Large 256.)

Section 17. Recovery of Fines.

That all fines, penalties, and forfeitures imposed by this Act may be recovered in any court of competent jurisdiction. (29 U. S. Stat. at Large 256.)

Section 18. Regulations.

That the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall make all needful regulations for the carrying into effect the provisions of this Act. (29 U. S. Stat. at Large 256.)

Section 19. When Act takes Effect, etc.

That this Act shall go into effect on the ninetieth day after its passage, and all wooden packages containing ten or more pounds of filled cheese on the premises of any dealer, on and after the ninetieth day succeeding the date of the passage of this Act, shall be deemed to be taxable under Section 9 of this Act, and shall be taxed, and shall have affixed thereto the stamps, marks, and brands required by this Act or by regulations made pursuant to this Act; and for the purpose of securing the affixing of the stamps, marks and brands required by this Act, the filled cheese shall be regarded as having been manufactured and sold or removed from the manufactory for consumption or use on or after the day this Act takes effect; and such stock on hand at the time of the taking effect of this Act may be stamped, marked, and branded under special regulations of the Commissioner of Internal Revenue, approved by the Secretary of the Treasury, and the Commissioner of Internal Revenue may authorize the holder of such packages to mark and brand the same, and to affix thereto the proper tax-paid stamps. (29 U. S. Stat. at Large 256.)

APPENDIX D.

INSPECTION OF ARTICLES OF FOOD AND DRINK, MEDICINES, ETC.

AN ACT providing for an inspection of meats for exportation, prohibiting the importation of adulterated articles of food and drink, and authorizing the President to make proclamation in certain cases, and for other purposes.

[Act of August 30, 1890, ch. 839, 26 U. S. Stat. at Large 414.]

Section 1. Salted Pork—Forging Marks—Inspection.

That the Secretary of Agriculture may cause to be made a careful inspection of salted pork and bacon intended for exportation, with a view to determining whether the same is wholesome, sound, and fit for human

over the laws, regulations, or orders of the government of any country to which such pork or bacon is to be exported shall require thereof relating to the importation thereof into such country, whenever any buyer, seller, or exporter of such meats intended therefor shall request the inspection thereof. Such inspection shall be made at the place where such meats are packed or boxed, and each such meat so inspected shall bear the marks, stamps, or other identification provided for in the last clause of this section: That an inspection of such meats may also be made at the port of exportation if any inspection has not been made at the place of origin, if, in the opinion of the Secretary of Agriculture, a reinspection is necessary. One copy of any certificate issued by any such inspector shall be filed in the Department of Agriculture; another copy shall be attached to the invoice of each separate shipment of such meat; and a third copy shall be delivered to the consignor or shipper of such meats. Whenever it is found that packages of salted pork and bacon have been found to be in accordance with the provisions of this Act, and found to be sound, and fit for human food; and for the identification of such meats, marks, stamps, or other devices as the Secretary of Agriculture by regulation prescribe shall be affixed to each of such packages. Any person who shall forge, counterfeit, or knowingly and unlawfully alter, deface, or destroy any of the marks, stamps, or other devices provided for in this section on any package of any such meats, or who shall forge, counterfeit, or knowingly and wrongfully alter, deface, or destroy any certificate in reference to meats provided for in this section, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding one thousand dollars or imprisonment for not more than one year, or by both said punishments, in the discretion of the court. (29 U. S. Stat. at Large 414.)

Section 2. Importation of Adulterated Food and Liquor.

It shall be unlawful to import into the United States any adulterated or unwholesome food or drug, or any vinous, spirituous or malted food, or any food adulterated or mixed with any poisonous or noxious chemical or ingredient injurious to health. Any person who shall knowingly import into the United States any such adulterated food or drug, or who, owing to or having reasons to believe the same to be adulterated, or who, as owner or the agent of the owner, or the consignor or consignee, or in privity with them, assisting in such unlawful act, shall be deemed guilty of a misdemeanor, and liable to prosecution therefor in the district court of the United States for the district into which the food or drug is imported; and, on conviction such person shall be fined not more than one thousand dollars for each separate shipment, or imprisoned by the court for a term not exceeding one year, or by both said punishments, in the discretion of the court. (26 U. S. Stat. at Large 415.)

Section 41 of ch. 661, Laws of N. Y. (1893), which provides that an article shall be deemed to be adulterated within the meaning of the Act if it be "colored, or coated, or polished, or powdered, whereby damage is concealed, or it is made to appear better than it really is, or of greater value," does not contravene the said Section 2 of the above Act of August 30, 1890, forbidding the importation into the United States of any adulterated or unwholesome food or drug or any vinous, spirituous or malt liquors, etc.; this latter Act containing no provisions authorizing the importation of articles for the purpose of deceiving and defrauding purchasers and consumers. *Crossman v. Lurman*, 171 N. Y. 329, 63 N. E. 1097; affirmed 192 U. S. 189, 24 Sup. Ct. 234, 48 L. Ed. 401.

Section 3. Forfeiture of Imported Adulterated Food.

That any article designed for consumption as human food or drink, and any other article of the classes or description mentioned in this Act, which shall be imported into the United States contrary to its provisions, shall be forfeited to the United States, and shall be proceeded against under the provisions of Chapter 18 of Title 13 of the Revised Statutes of the United States; and such imported property so declared forfeited may be destroyed or returned to the importer for exportation from the United States after the payment of all costs and expenses, under such regulations as the Secretary of the Treasury may prescribe; and the Secretary of the Treasury may cause such imported articles to be inspected or examined in order to ascertain whether the same have been so unlawfully imported. (26 U. S. Stat. at Large 415.)

Section 4. Suspension of Importation.

That whenever the President is satisfied that there is good reason to believe that any importation is being made, or is about to be made, into the United States, from any foreign country, or any article used for human food or drink that is adulterated to an extent dangerous to the health or welfare of the people of the United States, or any of them, he may issue his proclamation suspending the importation of such articles from such country for such period of time as he may think necessary to prevent such importation; and during such period it shall be unlawful to import into the United States from the countries designated in the proclamation of the President any of the articles the importation of which is so suspended. (26 U. S. Stat. at Large 415.)

Section 5. Discrimination by Foreign Countries.

That whenever the President shall be satisfied that unjust discriminations are made by or under the authority of any foreign state against the importation to or sale in such foreign state of any product of the

tes, he may direct that such products of such foreign state so
ing against any product of the United States as he may deem
ll be excluded from importation to the United States; and in
he shall make proclamation of his direction in the premises,
1 name the time when such direction against importation shall
, and after such date the importation of the articles named in
amation shall be unlawful. The President may at any time
dify, terminate, or renew any such direction as, in his opinion,
interest may require. (26 U. S. Stat. at Large 415.)

Inspection—Duties of Secretary of Agriculture.

investigate the adulteration of foods, drugs, and liquors when
the Secretary of Agriculture advisable; and the Secretary of
e, whenever he has reason to believe that articles are being
rom foreign countries which, by reason of such adulteration, are
to the health of the people of the United States, shall make
on the Secretary of the Treasury for samples from original
of such articles for inspection and analysis; and the Secretary
asury is hereby authorized to open such original packages and
specimens to the Secretary of Agriculture for the purpose
, giving notice to the owner or consignee of such articles, who
esent and have the right to introduce testimony; and the Secre-
e Treasury shall refuse delivery to the consignee of any such
ich the Secretary of Agriculture reports to him have been
and analyzed and found to be dangerous to health because of
terations. (32 U. S. Stat. at Large 296.)

This is from the Agricultural Appropriation Act of June 3,
ch. 985. Similar provisions occur in prior Appropriation
31 U. S. Stat. at Large 930; 31 Stat. at Large 196; 30 U.
at. at Large 951.

See the similar though less specific power conferred upon
ecretary of the Treasury as to adulterated or unwholesome
, drugs, etc., by the Act of August 30, 1890, ch. 839, § 3.

Inspection of Dairy Products.

the Secretary of Agriculture may construe the provisions of the
arch 3, 1891, as amended March 2, 1895, for the inspection of
and the products thereof, to include dairy products intended for
on to any foreign country, and may apply, under rules and regu-
be prescribed by him, the provisions of said Act for inspection
fication appropriate for ascertaining the purity and quality of
lucts, and may cause the same to be so marked, stamped, or
s to secure their identity and make known in the markets of
untries to which they may be sent from the United States their

purity, quality, and grade; and all the provisions of said Act relating to live cattle and products thereof for export shall apply to dairy products so inspected and certified: . . . (32 U. S. Stat. at Large 290.)

This is from the Agricultural Appropriation Act of June 3, 1902, ch. 985. The same provision occurs in the Appropriation Act of March 2, 1901, ch. 805, 31 U. S. Stat. at Large 926.

APPENDIX E.

TEA.

AN ACT to prevent the importation of impure and unwholesome tea.

[Act of March 2, 1897, ch. 358, 29 Stat. at Large 604.]

Section 1. Importation of Inferior Tea.

That from and after May 1, 1897, it shall be unlawful for any person or persons or corporation to import or bring into the United States any merchandise as tea which is inferior in purity, quality, and fitness for consumption to the standards provided in Section 3 of this Act, and the importation of all such merchandise is hereby prohibited. (29 U. S. Stat. at Large 604.)

This Act is a valid exercise of the constitutional power of Congress to regulate commerce. *Sang Lung v. Jackson*, 85 Fed. Rep. 502; *Butterfield v. Stranahan*, 192 U. S. 420, 24 Sup. Ct. 349, 48 L. Ed. 525.

Section 2. Board of Experts.

That immediately after the passage of this Act, and on or before February 15th of each year thereafter, the Secretary of the Treasury shall appoint a board, to consist of seven members, each of whom shall be an expert in teas, and who shall prepare and submit to him standard samples of tea; that the persons so appointed shall be at all times subject to removal by the said Secretary, and shall serve for the term of one year; that vacancies in the said board occurring by removal, death, resignation, or any other cause shall be forthwith filled by the Secretary of the Treasury by appointment, such appointee to hold for the unexpired term; that said board shall appoint a presiding officer, who shall be the medium of all communications to or from such board; that each member of said board shall receive as compensation the sum of fifty dollars per annum, which, together with all necessary expenses while engaged upon the duty herein provided, shall be paid out of the appropriation for "expenses of collecting the revenue from customs." (29 U. S. Stat. at Large 605.)

Section 3. Standards—Samples.

that the Secretary of the Treasury, upon the recommendation of said board, shall fix and establish uniform standards of purity, quality, and fitness for consumption of all kinds of teas imported into the United States, and shall procure and deposit in the custom houses of the ports of New York, Chicago, San Francisco, and such other ports as he may deem proper, duplicate samples of such standards; that said Secretary shall also cause to be deposited a sufficient number of other duplicate samples of such standards for use by the importers and dealers in tea at all ports desiring the same.

All teas, or merchandise described as tea, of inferior purity, quality, or fitness for consumption to such standards shall be deemed to be of inferior quality, and the prohibition of the first section hereof. (29 U. S. Stat. at Large, 105.)

In providing that the Secretary of the Treasury should establish uniform standards, and that a board of skilled experts should be appointed, Congress did not delegate to the Secretary any of its legislative power. *Sang Lung v. Jackson*, 85 Fed. Rep. 502.

By this Act the Secretary of the Treasury is authorized to establish uniform standards "which would be adequate to exclude the lowest grades of tea, whether demonstrably of inferior purity and fitness for consumption, or presumably or possibly so because of inferior quality." *Buttfield v. Bidwell*, 96 Fed. Rep. 328, 160 C. C. A. 506.

Section 4. Importer's Bond—Samples.

That on making entry at the custom house of all teas, or merchandise described as tea, imported into the United States, the importer or consignee shall give a bond to the collector of the port that such merchandise shall not be removed from the warehouse until released by the collector, and that it shall have been duly examined with reference to its purity, quality, and fitness for consumption; that for the purpose of such examination a sample of each line in every invoice of tea shall be submitted by the importer or consignee to the examiner, together with the sworn statement of the importer or consignee that such samples represent the true quality of the tea, and every part of the invoice and accord with the specifications contained; or, in the discretion of the Secretary of the Treasury, samples shall be obtained by the examiner and compared by him with the standards established by this Act; and in case where said tea, or merchandise described as tea, is entered at ports where there is no resident examiner as provided in Section 7, the consignee or importer shall in the manner aforesaid furnish under oath a sample of each line of the tea to the collector or other revenue officer to whom is committed the collection of duties, and said officer shall also draw or cause to be drawn a sample of each line in every invoice, and shall forward the same to a

duly qualified examiner as provided in Section 7; *Provided*, however, That the bond above required shall also be conditioned for the payment of all custom house charges which may attach to such merchandise prior to its being released or destroyed (as the case may be) under the provisions of this Act. (29 U. S. Stat. at Large 605.)

"Manifestly the seizure of importations of teas purchased after the approval of this Act, and the establishment of regulations and standards thereunder, publicly promulgated and known to complainants, because falling below the standards prescribed, could inflict no other injury than what it must be assumed was anticipated, and the interposition of a court of equity can not properly be invoked, under such circumstances, to determine in advance whether complainants, if they imported teas of that character, could escape the consequences on the ground of the invalidity of the law." *Cruikshank v. Bidwell*, 176 U. S. 73, 20 Sup. Ct. 280, 44 L. Ed. —.

Certain tea, known in the trade as Canton tea, was rejected by the board of appraisers as not being pure or wholesome. Such board being the tribunal named in the Act, and the decision being on a question of fact, such decision was held not a subject for review by the courts upon any allegation of mistake either of law or fact, on the ground that no standard of quality for Canton tea was mentioned in the regulations adopted by the Secretary of the Treasury for the purpose of determining the quality of imported teas. *Sang Lung v. Jackson*, 85 Fed. Rep. 502.

Section 5. Permit—Re-examination.

That, if after an examination as provided in Section 4, the tea is found by the examiner to be equal in purity, quality, and fitness for consumption to the standards hereinbefore provided, and no reexamination shall be demanded by the collector as provided in Section 6, a permit shall at once be granted to the importer or consignee declaring the tea free from the control of the customs authorities; but if on examination such tea, or merchandise described as tea, is found, in the opinion of the examiner, to be inferior in purity, quality, and fitness for consumption to the said standards, the importer or consignee shall be immediately notified, and the tea, or merchandise described as tea, shall not be released by the custom house, unless on a reexamination called for by the importer or consignee the finding of the examiner shall be found to be erroneous; *Provided*, That should a portion of the invoice be passed by the examiner, a permit shall be granted for that portion and the remainder held for further examination, as provided in Section 6. 29 Stat. at Large 605.)

Section 6. Re-examination—Permit—Destruction.

In case the collector, importer, or consignee shall protest against the examination of the examiner, the matter in dispute shall be referred for a board of three United States general appraisers, to be appointed by the Secretary of the Treasury, and if such board shall, after examination, find the tea in question to be equal in purity, quality, and fitness for consumption to the proper standards, a permit shall be granted to the collector for its release and delivery to the importer; but if after final reexamination by such board the tea shall be found to be inferior in purity, quality, and fitness for consumption to the said standards, the importer or consignee shall give a bond, with security to the collector, to export said tea, or merchandise described within the limits of the United States within a period of six months after final reexamination; and if the same shall not have been exported within the time specified, the collector, at the expiration of that time, shall cause the same to be destroyed. (29 U. S. Stat. at Large 606.)

Where each of the complainants has his separate and distinct interest in the tea which the defendant, the collector of customs, claims to destroy, under this Act, but they all have a common interest in the question whether he is authorized by law to destroy the tea, they all may, in order to prevent a multiplicity of suits, join together in an equitable action for injunction. *Sang Lung v. United States*, 85 Fed. Rep. 502.

Section 7. Examination by Qualified Examiner.

The examination herein provided for shall be made by a duly qualified examiner at a port where standard samples are established, and where the merchandise is entered at ports where there is no qualified examiner, the examination shall be made at that one of said ports which is nearest to the port of entry, and that for this purpose samples of the merchandise, obtained in the manner prescribed by Section 4 of this Act, shall be forwarded to the proper port by the collector or chief officer of the port of entry; that in all cases of examination or reexamination of merchandise described as tea, by examiners or boards of United States general appraisers under the provisions of this Act, the purity, quality, and fitness for consumption of the same shall be tested according to the proper grades and customs of the tea trade, including the testing of an ounce of the same in boiling water, and, if necessary, chemical analysis. (Stat. at Large 606.)

Section 8. Procedure on Re-examination.

In cases of reexamination of teas, or merchandise described as teas, by a board of United States general appraisers in pursuance of

the provisions hereof, samples of the tea, or merchandise described as tea, in dispute, for transmission to such board for its decision, shall be put up and sealed by the examiner, in the presence of the importer or consignee if he so desires, and transmitted to such board, together with a copy of the finding of the examiner, setting forth the cause of condemnation and the claim or ground of the protest of the importer relating to the same, such samples, and the papers therewith, to be distinguished by such mark that the same may be identified; that the decision of such board shall be in writing, signed by them, and transmitted, together with the record and samples, within three days after the rendition thereof, to the collector, who shall forthwith furnish the examiner and the importer or consignee with a copy of said decision or finding. The board of United States general appraisers herein provided for shall be authorized to obtain the advice, when necessary, of persons skilled in the examination of teas, who shall each receive for his services in any particular case a compensation not exceeding five dollars. (29 U. S. Stat. at Large 606.)

Section 9. Rejected Teas, Re-importing.

That no imported teas which have been rejected by a customs examiner or by a board of United States general appraisers, and exported under the provisions of this Act, shall be reimported into the United States under the penalty of forfeiture for a violation of this prohibition. (29 U. S. Stat. at Large 606.)

Section 10. Regulations.

That the Secretary of the Treasury shall have the power to enforce the provisions of this Act by appropriate regulations. (29 U. S. Stat. at Large 606.)

Section 11. Tea on Shipboard.

That teas actually on shipboard for shipment to the United States at the time of the passage of this Act shall not be subject to the prohibition hereof, but the provisions of the Act entitled "An Act to prevent the importation of adulterated and spurious teas," approved March 2, 1883, shall be applicable thereto. (29 U. S. Stat. at Large 607.)

Section 12. Repeal.

That the Act entitled "An Act to prevent the importation of adulterated and spurious teas," approved March 2, 1883, is hereby repealed, such repeal to take effect on the date on which this Act goes into effect. (29 U. S. Stat. at Large 607.)

APPENDIX F.**LABELS OR BRANDS AS TO STATE OF PRODUCTION.**

To prevent a false branding or marking of food and dairy products as to the State or Territory in which they are made or produced.

[Act of July 1, 1902, ch. 1357, 32 U. S. Stat. at Large 632.]

Section 1. Dairy and Fruit Products—False Labeling.

That no person or persons, company or corporation, shall introduce any State or Territory of the United States or the District of Columbia from any other State or Territory of the United States or the District of Columbia, or sell in the District of Columbia or in any Territory dairy or food products which shall be falsely labeled or branded as to the State or Territory in which they are made, produced, or procured, or cause or procure the same to be done by others. (32 U. S. Stat. at Large 632.)

Section 2. Penalty, Jurisdiction.

That if any person or persons violate the provisions of this Act, in person or through another, he shall be guilty of a misdemeanor, and shall be punished by a fine of not less than five hundred nor more than one thousand dollars; and that the jurisdiction for the prosecution of such misdemeanor shall be within the district of the United States in which it is committed. (32 U. S. Stat. at Large 632.)

APPENDIX G.**PORTATION OF DRUGS, MEDICINES, ETC.—EXAMINATION.****Section 2611. Oath of Examiners.**

That special examiners of drugs, medicines, chemicals, and so forth, shall, upon entering upon their duties, take and subscribe an oath faithfully to perform such duties, and to use their best endeavors to detect and prevent frauds upon the revenue of the United States; which oath shall be administered by the collector of the port or district where the examiner making it is employed. (R. S.)

Section 2612. Instructions.

That the Secretary of the Treasury shall give to the collectors of districts in which an examiner of drugs, medicines, and chemicals is not provided such instructions as he may deem necessary to prevent the importation of adulterated and spurious drugs and medicines.

Section 2933. Examination of Medicines.

All drugs, medicines, medical preparations, including medicinal essential oils and chemical preparations, used wholly or in part as medicine, imported from abroad, shall, before passing the custom house, be examined and appraised, as well in reference to their quality, purity, and fitness for medical purposes, as to their value and identity specified in the invoice. (R. S.)

Section 2934. Names on Medicines.

All medicinal preparation, whether chemical or otherwise, usually imported with the name of the manufacturer, shall have the true name of the manufacturer, and the place where they are prepared, permanently and legibly affixed to each parcel by stamp, label, or otherwise; and all medicinal preparations imported without such names so affixed shall be adjudged to be forfeited. (R. S.)

Section 2935. Return for Examination.

If, on examination, any drugs, medicines, medicinal preparations, whether chemical or otherwise, including medicinal essential oils, are found, in the opinion of the examiner, to be so far adulterated, or in any manner deteriorated, as to render them inferior in strength and purity to the standard established by the United States, Edinburgh, London, French, and German pharmacopoeias and dispensaries, and thereby improper, unsafe, or dangerous to be used for medicinal purposes, a return effect shall be made upon the invoice, and the articles so noted shall not pass the custom house, unless, on a reexamination of a strictly analytical character, called for by the owner or consignee, the return of the examiner shall be found erroneous, and it is declared, as a result of such analysis, that the articles may properly, safely, and without danger, be used for medicinal purposes. (R. S.)

Section 2936. Appeal.

The owner or consignee shall, at all times, when dissatisfied with the examiner's return, have the privilege of calling, at his own expense, for a reexamination, and the collector, upon receiving a deposit of such sum as he may deem sufficient to defray such expense, shall procure some competent analytical chemist possessing the confidence of the medical profession, as well as of the colleges of medicine and pharmacy, if any such institutions exist in the State in which the collection-district is situated, to make a careful analysis of the articles included in the return, and a report on the same under oath. In case this report, which shall be final, shall declare the return of the examiner to be erroneous, and the articles to be of the requisite strength and purity, according to the standards referred to in the next preceding section, the entire invoice shall be passed without reservation, on payment of the customary duties. (R. S.)

[Act of June 26, 1848, ch. 70, 9 U. S. Stat. at Large 238.]

By the Act of February 27, 1877, ch. 69, 19 U. S. Stat. at Large 247, this section was amended to read as above given by inserting the words "to make" after the word "situated."

Section 2937. Exportation of Rejected Articles.

the examiner's return, however, shall be sustained by the analysis report, the articles shall remain in charge of the collector, and the owner or consignee, on payment of the charges of storage and other expenses necessarily incurred by the United States, and on giving a bond or sureties satisfactory to the collector to land the articles out of the United States, shall have the privilege of reexporting them at any time within the period of six months after the report of the examiner; but if the articles shall not be sent out of the United States within the time specified, the collector, at the expiration of that time, may cause the same to be destroyed, and hold the owner or consignee liable to the United States for the payment of all charges, in the same manner as if the articles had been reexported. (R. S.)

Section 2938. Appraisers as Special Examiners.

One of the assistant appraisers at the port of New York, to be selected with special reference to his qualifications for such duties, shall, in addition to the duties that may be required of him by the appraiser, perform the duties of a special examiner of drugs, medicines, chemicals, and other articles. (R. S.)

[Act of July 27, 1866, ch. 284, 14 U. S. Stat. at Large 302.]

"Section 2938 implies that the appraiser, who revises and corrects the reports of an assistant appraiser (Section 2929), has the general supervision of the duties of examination or appraisal performed where specially qualified experts are requisite." Op. Atty-Gen. 238.

APPENDIX H.

OPIUM.

TO provide for the execution of the provisions of Article II of the treaty concluded between the United States of America and the Emperor of China on the 17th day of November, 1880, and proclaimed by the President of the United States on the 5th day of October, 1881.

[Act of February 23, 1887, ch. 210, 24 U. S. Stat. at Large 409.]

Section 1. Importation by Chinese

That the importation of opium into any part of the ports of the

United States by any subject of the Emperor of China is hereby prohibited. Every person guilty of a violation of the preceding provision shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine of not more than five hundred dollars nor less than fifty dollars, or by imprisonment for a period of not more than six months nor less than thirty days, or by both such fine and imprisonment, in the discretion of the court. (24 U. S. Stat. at Large 409.)

Section 2. Forfeiture.

That every package containing opium, either in whole or in part, imported into the United States by any subject of the Emperor of China, shall be deemed forfeited to the United States; and proceedings for the declaration and consequences of such forfeiture may be instituted in the courts of the United States as in other cases of the violation of the laws relating to other illegal importations. (24 U. S. Stat. at Large 409.)

Section 3. Traffic in China—Fine—Forfeiture.

That no citizen of the United States shall import opium into any of the open ports of China, nor transport the same from one open port to any other open port, or buy or sell opium in any of such open ports of China, nor shall any vessel owned by citizens of the United States, or any vessel, whether foreign or otherwise, employed by any citizen of the United States, or owned by any citizen of the United States, either in whole or in part, and employed by persons not citizens of the United States, take or carry opium into any of such open ports of China, or transport the same from one open port to any other open port, or be engaged in any traffic therein between or in such open ports, or any of them. Citizens of the United States offending against the provisions of this section shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine not exceeding five hundred dollars nor less than fifty dollars, or by both such punishments, in the discretion of the court. The consular courts of the United States in China, concurrently with any district court of the United States in the district in which any offender may be found, shall have jurisdiction to hear, try, and determine all cases arising under the foregoing provisions of this section, subject to the general regulations provided by law. Every package of opium or package containing opium, either in whole or in part, brought, taken, or transported, trafficked, or dealt in contrary to the provisions of this section, shall be forfeited to the United States, for the benefit of the Emperor of China: and such forfeiture, and the declaration and consequences thereof, shall be made, had, determined, and executed by the proper authorities of the United States exercising judicial powers within the Empire of China. (24 Stat. at Large 409.)

APPENDIX I.**ON OF FOOD AND DRUGS IMPORTED OR EXPORTED.****Inspection—Powers and Duties of Secretary of Agriculture.**

to investigate the adulteration, false labeling, or false brand-marks, beverages, condiments, and ingredients of such articles, by the Secretary of Agriculture advisable, and report the results to the President of the Department; and the Secretary of Agriculture, for good reason to believe that such articles are being imported from countries which are dangerous to the health of the people of the United States, or which shall be falsely labeled or branded either as to the place of their manufacture or production, request upon the Secretary of the Treasury for samples from the packages of such articles for inspection and analysis, and the Secretary of the Treasury is hereby authorized to open such original packages and deliver specimens to the Secretary of Agriculture for the purpose of inspection, giving notice to the owner or consignee of such articles, and the Secretary of Agriculture shall have the right to introduce testimony; and the Secretary of the Treasury shall refuse delivery to the consignee of any such articles which the Secretary of Agriculture reports to him have been analyzed and found to be dangerous to health or falsely labeled, either as to their contents or as to the place of their production or which are forbidden entry or to be sold, or which are in sale in the countries in which they are made or from which they are exported, . . . (33 Stat. at Large 874.)

from the Agricultural Department Appropriation Act of March 3, 1905, ch. 1405, 33 Stat. at Large 874. Provisions similar were contained in the Acts of March 3, 1903, ch. 1157, 33 Stat. at Large 1157; April 23, 1904, ch. 1486, 33 Stat. at Large 1486.

As to the delivery to importer, the Department of Agriculture and the Treasury Department have no jurisdiction or power under the Act of March 3, 1903, to prevent or to punish the false labeling of dairy or food products after they have passed through the customhouse and are delivered to the owner or consignee. *Op. Atty-Gen.* 675.

As to the charges for storage of imported foods, etc., detained by the Secretary of the Treasury pending examination under the Act of March 3, 1903, such charges can not be imposed upon the importer. *United States v. Egan*, 133 Fed. Rep. 842.

OF DAIRY PRODUCTS INTENDED FOR EXPORTATION—DUTIES OF SECRETARY OF AGRICULTURE.]

Provisions of the Act of June 3, 1902, ch. 985, are repeated in the

Acts of March 3, 1903, ch. 1008, 32 Stat. at Large 1151; April 23, 1904, ch. 1486, 33 Stat. at Large 281; March 3, 1905, ch. 1405, 33 Stat. at Large 865.

Section 1. Nutrive Investigations.

. . . . To enable the Secretary of Agriculture to investigate and report upon the nutritive value of the various articles and commodities used for human food, with special suggestions of full, wholesome, and edible rations less wasteful and more economical than those in common use, including special investigations on the nutritive value and economy of the diet in public institutions; and the agricultural experiment stations are hereby authorized and directed to cooperate with the Secretary of Agriculture in carrying out said investigations in such manner and to such extent as may be warranted by a due regard to the varying conditions and needs of the respective States and Territories, and as may be mutually agreed upon; and the Secretary of Agriculture is hereby authorized to require said stations to report to him the results of any such investigations which they may carry out, whether in cooperation with said Secretary of Agriculture or otherwise, . . . dollars. . . . (33 Stat. at Large 294.)

This is from the Agricultural Department Appropriation Act of April 23, 1904, ch. 1486.

APPENDIX J.

OLEOMARGARINE.

Federal Statute.

AN ACT defining butter, also imposing a tax upon and regulating the manufacture, sale, importation, and exportation of oleomargarine.¹

[Act of August 2, 1886, ch. 840, 24 Stat. at Large 209.]

Section 1. Butter Defined.

That for the purpose of this Act the word "butter" shall be understood to mean the food product usually known as butter, and which is

¹ The government of the United States furnishes a pamphlet containing this statute, with full instructions and forms, and with notes construing its provisions. No charge is made for it. As it can be so easily obtained it was thought best to omit it here, except the bare statute. The subject matter of this statute is only incidentally connected with the subject of Pure Food.

made exclusively from milk or cream, or both, with or without common salt, and with or without additional coloring matter.

Section 2. Oleomargarine Defined.

That for the purposes of this Act certain manufactured substances, certain extracts, and certain mixtures and compounds, including such mixtures and compounds with butter, shall be known as designated as "oleomargarine," namely: All substances heretofore known as oleomargarine, oleo, oleomargarine oil, butterine, lardine, suine, and neutral; all mixtures and compounds of oleomargarine, oleo, oleomargarine-oil, butterine, lardine, suine, and neutral; all lard extracts and tallow extracts; and all mixtures and compounds of tallow, beef-fat, suet, lard, lard-oil, vegetable oil, annatto, and other coloring matter, intestinal fat, and offal fat made in imitation or semblance of butter, or when so made, calculated or intended to be sold as butter or for butter.

Section 3. Special Taxes.

That special taxes are imposed as follows:

Manufacturers of oleomargarine shall pay six hundred dollars. Every person who manufactures oleomargarine for sale shall be deemed a manufacturer or oleomargarine.

And any person that sells, vends, or furnishes oleomargarine for the use and consumption of others, except to his own family table without compensation, who shall add to or mix with such oleomargarine any artificial coloration that causes it to look like butter of any shade of yellow shall also be held to be a manufacturer of oleomargarine within the meaning of said Act, and subject to the provisions thereof.

Wholesale dealers in oleomargarine shall pay four hundred and eighty dollars. Every person who sells or offers for sale oleomargarine in the original manufacturer's packages shall be deemed a wholesale dealer in oleomargarine. But any manufacturer of oleomargarine who has given the required bond and paid the required special tax, and who sells only oleomargarine of his own production, at the place of manufacture, in the original packages to which the tax-paid stamps are affixed, shall not be required to pay the special tax of a wholesale dealer in oleomargarine on account of such sales.

Retail dealers in oleomargarine shall pay forty-eight dollars. Every person who sells oleomargarine in less quantities than ten pounds at one time shall be regarded as a retail dealer in oleomargarine. And Sections 3232, 3233, 3234, 3235, 3236, 3237, 3238, 3239, 3240, 3241, 3243 of the Revised Statutes of the United States are, so far as applicable, made to extend to and include and apply to the special taxes imposed by this section, and to the persons upon whom they are imposed: *Provided further*, That wholesale dealers who vend no other oleomargarine or

butterine except that upon which a tax of one-fourth of one cent per pound is imposed by this Act, as amended, shall pay two hundred dollars; and such retail dealers as vend no other oleomargarine or butterine except that upon which is imposed by this Act, as amended, a tax of one-fourth of one cent per pound shall pay six dollars. (As amended May 9, 1902.)

Section 4. Penalty for Violations by Manufacturer.

That every person who carries on the business of a manufacturer of oleomargarine without having paid the special tax therefor, as required by law, shall, besides being liable to the payment of the tax, be fined not less than one thousand and not more than five thousand dollars; and every person who carries on the business of a wholesale dealer in oleomargarine without having paid the special tax therefor, as required by law, shall, besides being liable to the payment of the tax, be fined not less than five hundred nor more than two thousands dollars; and every person who carries on the business of a retail dealer in oleomargarine without having paid the special tax therefor, as required by law, shall, besides being liable to the payment of the tax, be fined not less than fifty dollars nor more than five hundred dollars for each and every offense.

Section 5. Manufacturer's Notices, Inventories, Signs, Books, Etc.

That every manufacturer of oleomargarine shall file with the collector of internal revenue of the district in which his manufactory is located such notices, inventories, and bonds, shall keep such books and render such returns of materials and products, shall put up such signs and affix such number to his factory, and conduct his business under such surveillance of officers and agents as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may, by regulation, require. But the bond required of such manufacturer shall be with sureties satisfactory to the collector of internal revenue, and in a penal sum of not less than five thousand dollars; and the sum of said bond may be increased from time to time and additional sureties required at the discretion of the collector, or under instructions of the Commissioner of Internal Revenue.

Section 6. Packing and Marking Oleomargarine—Penalty.

That all oleomargarine shall be packed by the manufacturer thereof in firkins, tubs, or other wooden packages not before used for that purpose, each containing not less than ten pounds, and marked, stamped, and branded as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall prescribe; and all sales made by manufacturers of oleomargarine, and wholesale dealers in oleomargarine shall be in original stamped packages. Retail dealers in oleomargarine

must sell only from original stamped packages, in quantities not exceeding ten pounds, and shall pack the oleomargarine sold by them in suitable wooden or paper packages which shall be marked and branded as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall prescribe. Every person who knowingly sells or offers for sale, or delivers or offers to deliver, any oleomargarine in any other form than in new wooden or paper packages as above described, or who packs in any package any oleomargarine in any manner contrary to law, or who falsely brands any package or affixes a stamp on any package denoting a less amount of tax than that required by law shall be fined for each offense not more than one thousand dollars, and be imprisoned not more than two years. (Section 6, Act of August 2, 1886, 24 U. S. Stat. at Large 210.)

Section 7. Label of Manufacturer—Penalty.

That every manufacturer of oleomargarine shall securely affix, by pasting, on each package containing oleomargarine manufactured by him, a label on which shall be printed, besides the number of the manufactory and the district and State in which it is situated, these words: "Notice—The manufacturer of the oleomargarine herein contained has complied with all the requirements of law. Every person is cautioned not to use either this package again or the stamp thereon again, nor to remove the contents of this package without destroying said stamp, under the penalty provided by law in such cases." Every manufacturer of oleomargarine who neglects to affix such label to any package containing oleomargarine made by him, or sold or offered for sale by or for him, and every person who removes any such label so affixed from any such package, shall be fined fifty dollars for each package in respect to which such offense is committed.

Section 8. Tax on Manufacture—Stamps.

That upon oleomargarine which shall be manufactured and sold, or removed for consumption or use, there shall be assessed and collected a tax of ten cents per pound, to be paid by the manufacturer thereof; and any fractional part of a pound in a package shall be taxed as a pound: *Provided*, When oleomargarine is free from artificial coloring that causes it to look like butter of any shade of yellow said tax shall be one-fourth of one cent per pound. The tax levied by this section shall be represented by coupon stamps; and the provisions of existing laws governing the engraving, issue, sale, accountability, effacement, and destruction of stamps relating to tobacco and snuff, as far as applicable, are hereby made to apply to stamps provided for by this section. (As amended May 9, 1902.)

Section 9. Oleomargarine Sold Without Stamps to Be Taxed.

That whenever any manufacturer of oleomargarine sells, or removes for sale or consumption, any oleomargarine upon which the tax is required to be paid by stamps, without the use of the proper stamps, it shall be the duty of the Commissioner of Internal Revenue, within a period of not more than two years after such sale or removal, upon satisfactory proof, to estimate the amount of tax which has been omitted to be paid, and to make an assessment therefore and certify the same to the collector. The tax so assessed shall be in addition to the penalties imposed by law for such sale or removal.

Section 10. Imported Oleomargarine.

That all oleomargarine imported from foreign countries shall, in addition to any import duty imposed on the same, pay an internal revenue tax of fifteen cents per pound, such tax to be represented by coupon stamps as in the case of oleomargarine manufactured in the United States. The stamps shall be affixed and canceled by the owner or importer of the oleomargarine while it is in the custody of the proper custom-house officers; and the oleomargarine shall not pass out of the custody of said officers until the stamps have been so affixed and canceled, but shall be put up in wooden packages, each containing not less than ten pounds, as prescribed in this Act for oleomargarine manufactured in the United States, before the stamps are affixed; and the owner or importer of such oleomargarine shall be liable to all the penal provisions of this Act prescribed for manufacturers of oleomargarine manufactured in the United States. Whenever it is necessary to take any oleomargarine so imported to any place other than the public stores of the United States for the purpose of affixing and canceling such stamps, the collector of customs of the port where such oleomargarine is entered shall designate a bonded warehouse to which it shall be taken, under the control of such customs officer as such collector may direct; and every officer of customs who permits any such oleomargarine to pass out of his custody or control without compliance by the owner or importer thereof with the provisions of this section relating thereto, shall be guilty of a misdemeanor, and shall be fined not less than one thousand dollars nor more than five thousand dollars, and imprisoned not less than six months nor more than three years. Every person who sells or offers for sale any imported oleomargarine, or oleomargarine purporting or claimed to have been imported, not put up in packages and stamped as provided by this Act, shall be fined not less than five hundred dollars nor more than five thousand dollars, and be imprisoned not less than six months nor more than two years.

Section 11. Purchasing or Receiving for Sale Oleomargarine not Stamped.

That every person who knowingly purchases or receives for sale any oleomargarine which has not been branded or stamped according to law shall be liable to a penalty of fifty dollars for each such offense.

Section 12. Purchasing from Manufacturer not Having Paid Special Tax.

That every person who knowingly purchases or receives for sale any oleomargarine from any manufacturer who has not paid the special tax shall be liable for each offense to a penalty of one hundred dollars, and to a forfeiture of all articles so purchased or received, or of the full value thereof.

Section 13. Stamps on Empty Packages to be Destroyed.

That whenever any stamped package containing oleomargarine is emptied, it shall be the duty of the person in whose hands the same is to destroy utterly the stamps thereon; and any person who willfully neglects or refuses so to do shall for each such offense be fined not exceeding fifty dollars, and imprisoned not less than ten days nor more than six months. And any person who fraudulently gives away or accepts from another, or who sells, buys, or uses for packing oleomargarine, any such stamped package, shall for each offense be fined not exceeding one hundred dollars, and be imprisoned not more than one year. Any revenue officer may destroy any emptied oleomargarine package upon which the tax-paid stamp is found.

Section 14. Appointment of Chemists and Microscopists—Decision in Contested Cases—Appeal.

That there shall be in the office of the Commissioner of Internal Revenue an analytical chemist and a microscopist, who shall each be appointed by the Secretary of the Treasury, and shall each receive a salary of two thousand five hundred dollars per annum; and the Commissioner of Internal Revenue may, whenever in his judgment the necessities of the service so require, employ chemists and microscopists, to be paid such compensation as he may deem proper, not exceeding in the aggregate any appropriation made for that purpose. And such Commissioner is authorized to decide what substances, extracts, mixtures, or compounds which may be submitted for his inspection in contested cases are to be taxed under this Act; and his decision in matters of taxation under this Act shall be final. The Commissioner may also decide whether any substance made in imitation or semblance of butter, and intended for human consumption, contains ingredients deleterious to the public health; but in case of doubt or contest his decision in this class of cases may be appealed from to a board hereby constituted for the purpose, and com-

posed of the Surgeon-General of the Army, the Surgeon-General of the Navy, and the Commissioner [now Secretary] of Agriculture; and the decision of this board shall be final in the premises.

Section 15. Forfeiture of Unstamped Packages and Deleterious Oleomargarine—Removing Stamps.

That all packages of oleomargarine subject to tax under this Act that shall be found without stamps or marks as herein provided, and all oleomargarine intended for human consumption which contains ingredients adjudged, as hereinbefore provided, to be deleterious to the public health, shall be forfeited to the United States. Any person who shall willfully remove or deface the stamps, marks, or brands on a package containing oleomargarine taxed as provided herein shall be guilty of a misdemeanor, and shall be punished by a fine of not less than one hundred dollars nor more than two thousand dollars, and by imprisonment for not less than thirty days nor more than six months.

Section 16. Oleomargarine for Export.

That oleomargarine may be removed from the place of manufacture for export to a foreign country without payment of tax or affixing stamps thereto, under such regulations and the filing of such bonds and other security as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may prescribe. Every person who shall export oleomargarine shall brand upon every tub, firkin, or other package containing such article the word "Oleomargarine," in plain Roman letters not less than one-half inch square.

Section 17. Export Regulations.

That whenever any person engaged in carrying on the business of manufacturing oleomargarine defrauds, or attempts to defraud, the United States of the tax on the oleomargarine produced by him, or any part thereof, he shall forfeit the factory and manufacturing apparatus used by him, and all oleomargarine and all raw material for the production of oleomargarine found in the factory and on the factory premises, and shall be fined not less than five hundred dollars nor more than five thousand dollars, and be imprisoned not less than six months nor more than three years.

Section 18. Failure to Comply with Regulations.

That if any manufacturer of oleomargarine, any dealer therein, or any importer or exporter thereof shall knowingly or willfully omit, neglect, or refuse to do, or cause to be done, any of the things required by law in the carrying on or conducting of his business, or shall do anything by this Act prohibited, if there be no specific penalty or punishment

imposed by any other section of this Act for the neglecting, omitting, or refusing to do, or for the doing or causing to be done, the thing required or prohibited, he shall pay a penalty of one thousand dollars; and if the person so offending be the manufacturer of or a wholesale dealer in oleomargarine, all the oleomargarine owned by him, or in which he has any interest as owner, shall be forfeited to the United States.

Section 19. Recovery of Fines.

That all fines, penalties, and forfeitures imposed by this Act may be recovered in any court of competent jurisdiction.

Section 20. Regulations.

That the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may make all needful regulations for the carrying into effect of this Act.

Section 21. When Act takes Effect—Tax of Stock on Hand.

That this Act shall go into effect on the ninetieth day after its passage; and all wooden packages containing ten or more pounds of oleomargarine found on the premises of any dealer on or after the ninetieth day succeeding the date of the passage of this Act shall be deemed to be taxable under Section 8 of this Act, and shall be taxed, and shall have affixed thereto the stamps, marks, and brands required by this Act or by regulations made pursuant to this Act; and for the purpose of securing the affixing of the stamps, marks, and brands required by this Act, the oleomargarine shall be regarded as having been manufactured and sold, or removed from the manufactory for consumption or use, on or after the day this Act takes effect; and such stock on hand at the time of the taking effect of this Act may be stamped, marked, and branded under special regulations of the Commissioner of Internal Revenue, approved by the Secretary of the Treasury; and the Commissioner of Internal Revenue may authorize the holder of such packages to mark and brand the same and to affix thereto the proper tax-paid stamps.

AN ACT to make oleomargarine and other imitation dairy products subject to the laws of any State or Territory, or the District of Columbia into which they are transported, and to change the tax on oleomargarine, and to impose a tax, provide for the inspection, and to regulate the manufacture and sale of certain dairy products, and to amend an Act entitled "An Act defining butter, also imposing a tax upon and regulating the manufacture, sale, importation, and exportation of oleomargarine," approved August 2, 1886.

[Act of May 9, 1902, ch. 784, 32 Stat. at Large 194.]

Section 1. Imitation Dairy Products Subject to State Laws.

That all articles known as oleomargarine, butterine, imitation, process, renovated, or adulterated butter, or imitation cheese, or any substance in the semblance of butter or cheese not the usual product of the dairy and not made exclusively of pure and unadulterated milk or cream, transported into any State or Territory or the District of Columbia, and remaining therein for use, consumption, sale, or storage therein, shall, upon arrival within the limits of such State or Territory or the District of Columbia, be subject to the operation and effect of the laws of such State or Territory or the District of Columbia, enacted in the exercise of its police powers to the same extent and in the same manner as though such articles or substances had been produced in such State or Territory or the District of Columbia, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise.

APPENDIX K.

Note.—This is the pamphlet issued by the United States government. All changes in the rules and regulations have been brought down to date by the author. They are inserted in brackets.

REGULATIONS CONCERNING ADULTERATED BUTTER.

(Definitions.)

AN ACT defining butter, also imposing a tax upon and regulating the manufacture, sale, importations, and exportation of oleomargarine.
Approved, August 2, 1886.

Butter Defined (Statute).

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That for the purpose of this Act the word "butter" shall be understood to mean the food product usually known as butter, and which is made exclusively from milk or cream, or both, with or without common salt, and with or without additional coloring matter.

Act of May 9, 1902:

Section 4. Adulterated Defined—Process or Renovated (Statute).

That for the purpose of this Act "butter" is hereby defined to mean an article of food as defined in "An Act defining butter, also imposing a tax upon and regulating the manufacture, sale, importation, and exportation of oleomargarine," approved August 2, 1886; that "adulterated butter" is hereby defined to mean a grade of butter produced by mixing, reworking, rechurning in milk or cream, refining, or in any way producing

a uniform, purified, or improved product from different lots or parcels of melted or unmelted butter or butter fat, in which any acid, alkali, chemical, or any substance whatever is introduced or used for the purpose or with the effect of deodorizing or removing therefrom rancidity, or any butter or butter fat with which there is mixed any substance foreign to butter as herein defined, with intent or effect of cheapening in cost the product, or any butter in the manufacture or manipulation of which any process or material is used with intent or effect of causing the absorption of abnormal quantities of water, milk, or cream; that "process butter" or "renovated butter" is hereby defined to mean butter which has been subjected to any process by which it is melted, clarified, or refined and made to resemble genuine butter, always excepting "adulterated butter" as defined by this Act.

Three Classes of Butter—First Class.

The evident intent of this section is to define all products properly known or designated as butter, and to separate them into three classes for the purposes of the Act. The first paragraph of the section adopts the definition of "butter" used in the Act of August 2, 1886, as being "The food product usually known as butter, which is made exclusively from milk or cream, or both, with or without common salt, and with or without additional coloring matter."

All butter which does not come under the terms of this definition, therefore, necessarily falls into one of the other two classes, upon which a tax is laid.

The next paragraph of the section defines "adulterated butter," the product which bears the higher rate of tax, in a long clause, which is evidently intended to describe with some particularity well-defined forms of adulteration as examples or guides.

Second Class.

Such are, first, "A grade of butter produced by mixing, reworking, rechurning in milk or cream, refining, or in anyway producing a uniform, purified, or improved product from different lots or parcels of melted or unmelted butter or butter fat, in which any acid, alkali, chemical, or any substance whatever is introduced or used for the purpose or with the effect of deodorizing or removing therefrom rancidity;" second, "Any butter or butter fat with which there is mixed any substance foreign to butter as herein defined, with intent or effect of cheapening in cost the product, or any butter in the manufacture or manipulation of which any process or material is used with intent or effect of causing the absorption of abnormal quantities of water, milk, or cream."

Briefly stated, the first instance described reworked or renovated butter to which any substance has been added to "deodorize or remove rancidity;" the second instance describes butter cheapened in cost by

admixtures; and the third instance, made to "contain abnormal quantities of water, etc." (So-called emulsified or milk-blended butter.)

Third Class.

A third class of butter, defined as process or renovated butter, is the grade which has been subjected to any process by which it is melted, clarified, or refined and made to resemble genuine butter, always excepting "adulterated butter."

Adulterated Butter Further Defined.

The definition of adulterated butter as contained in the Act of May 9, 1902, embraces butter in the manufacture of which any process or material is used whereby the product is made to "contain abnormal quantities of water, milk or cream," but the normal content of moisture permissible is not fixed by the Act. This being the case it becomes necessary to adopt a standard for moisture in butter, which shall in effect represent the normal quantity. It is therefore held that butter having sixteen percent or more of moisture contains an abnormal quantity and is classed as adulterated butter. [T. D. 1493.]

[That part of the rule fixing the standard of butter so that it must not contain sixteen percent of moisture or over is void. *United States v. Eleven Thousand One Hundred and Fifty Pounds of Butter*, 188 Fed. 197. But exactly the contrary has been decided. *Cooperville Co-operative Creamery Co. v. Lemon*, 89 C. C. A. 595, 163 Fed. 145.]

Ladled Butter Defined.

The product commonly known as "ladled" butter is a grade of butter made by mixing and reworking different lots or parcels of butter so as to secure a uniform product. This is known by various names to the trade. This product will not be held to be renovated butter unless in addition to being reworked it is melted and refined. It will not be held to be adulterated butter unless materials foreign to statutory butter are added to it or it is made to contain sixteen percent or more of moisture. Persons who engage in the production of "ladled" butter as a business will be held liable to special tax as manufacturers of renovated butter if they melt and refine their product, and to special tax as manufacturers of adulterated butter if they use in it substances foreign to statutory butter or produce a butter having sixteen percent or more of water. Persons who sell "ladled" butter which is adulterated will be liable to special tax as dealers in adulterated butter.

Creamery Butter.

Grades of butter produced in large establishments directly from milk or cream are known as creamery butter. The manufacturers of this butter

will not be held liable to special tax unless they involve their product in one or the other rate of tax as set forth above with reference to "ladled" butter. The owners of such establishments must see that their product is statutory butter, and they must exercise particular care with reference to its water content.

Addition of Foreign Fats Makes Oleomargarine.

The addition of small quantities of a foreign fat, lard, or oil to butter will render the product liable to tax as oleomargarine, and the producer thereof to special tax as manufacturer of oleomargarine.

Whey Butter Defined.

Whey butter is classed as adulterated butter when it contains sixteen percent or more of moisture.

Sweet Butter.

"Sweet" or unsalted butter is made and sold to some extent, especially in the large cities. When made by reworking country butter it must necessarily fall under the classification of "renovated butter," as the salt can not be removed except by a process of melting and separating. If the product reaches or exceeds the limit of sixteen percent of water content, or if materials foreign to butter are added to it for the purpose or with the effect of removing rancidity or of cheapening the product, it will be classed as "adulterated butter," or as oleomargarine if foreign fats are added.

Definition of Manufacturer of Process or Renovated or Adulterated Butter.

Special taxes are imposed as follows:

Manufacturers of process or renovated butter shall pay fifty dollars per year and manufacturers of adulterated butter shall pay six hundred dollars per year. Every person who engages in the production of process or renovated butter or adulterated butter as a business shall be considered to be a manufacturer thereof.

Wholesale Dealer in Adulterated Butter.

Wholesale dealers in adulterated butter shall pay a tax of four hundred and eighty dollars per annum, and retail dealers in adulterated butter shall pay a tax of forty-eight dollars per annum. Every person who sells adulterated butter in less quantities than ten pounds at one time shall be regarded as a retail dealer in adulterated butter.

Dealer in Adulterated Butter Defined.

Every person who sells adulterated butter shall be regarded as a dealer in adulterated butter. And Sections 3232, 3233, 3234, 3235, 3236, 3237, 3238, 3239, 3240, 3241, 3243 of Revised Statutes.

Notices, Inventories, and Bonds to be Filed.

Section 4 of said Act of May 9, 1902, further provides:

That every manufacturer of process or renovated butter or adulterated butter shall file with the collector of internal revenue of the district in which his manufactory is located such notices, inventories, and bonds, shall keep such books and render such returns of material and products, shall put up such signs and affix such number of his factory, and conduct his business under such surveillance of officers and agents, as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may by regulation require. But the bond required of such manufacturer shall be with sureties satisfactory to the collector of internal revenue and in a penal sum of not less than five hundred dollars; and the sum of said bond may be increased from time to time and additional sureties required at the discretion of the collector or under instructions of the Commissioner of Internal Revenue.

Books to be Kept and Returns Made.

Section 6 of said Act also provides:

That wholesale dealers in oleomargarine, process, renovated, or adulterated butter shall keep such books and render such returns in relation thereto as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, by regulation, require; and such books shall be open at all times to the inspection of any internal revenue officer or agent. And any person who willfully violates any of the provisions of this section shall for each offense be fined not less than fifty dollars and not exceeding five hundred dollars, and imprisoned not less than thirty days nor more than six months.

To carry into effect these provisions of the Act, the foregoing regulations respecting the filing of notices, bonds, and inventories; the keeping of books and rendering returns; the numbering of factories and the placing of signs on such factories (in the case of manufacturers of oleomargarine), and the keeping of books and making returns (in the case of wholesale dealers in that article), including the duties of officers in relation thereto, are, so far as applicable, hereby extended and made to apply to the

business carried on respectively by manufacturers of and wholesale dealers in adulterated butter, and manufacturers of process or renovated butter, as defined in said Act.

The records and returns required in such cases will be numbered and designated as follows:

Forms for Adulterated and Renovated Butter.

Form No.

- 497.....Adulterated butter manufacturer's monthly return (outside).
- .. 497.....Adulterated butter manufacturer's monthly return (inside).
- 498.....Monthly return of wholesale dealer in adulterated butter (outside).
- 498.....Monthly return of wholesale dealer in adulterated butter (inside).
- 499.....Monthly return of manufacturer of renovated butter (outside).
- 499.....Monthly return of manufacturer of renovated butter (inside).
- 501.....Report of persons who paid special tax as dealers in adulterated butter.
- 504.....Collector's monthly return of adulterated butter account.
- 505.....Notice by manufacturer of adulterated butter.
- 506.....Bond of manufacturer of adulterated butter.
- 507.....Notice by manufacturer of renovated butter.
- 508.....Bond of manufacturer of renovated butter.
- 509.....Inventory manufacturer of renovated butter.
- 510.....Inventory manufacturer of adulterated butter.
- 511.....Form of book to be kept by manufacturer of renovated butter.
- 512.....Form of book to be kept by manufacturer of adulterated butter.
- 513.....Form of book to be kept by wholesale dealer in adulterated butter.
- 515.....Collector's monthly return of renovated butter account.
- Form A (Cat. No. 549)..Adulterated butter export bond.
- Form B (Cat. No. 550)..Application for withdrawal of adulterated butter for export.

Note.—As “adulterated” butter and “process or renovated” butter are regarded, under the law, as distinct articles, and are subject to a different rate of tax, manufacturers of either or both of such articles will be required to keep separate records and to render separate returns for each of said articles. Wholesale

dealers in adulterated butter are also required to keep books and make returns.

Marking, Branding, etc., Adulterated Butter Packages.¹

Section 4 of said Act of May 9, 1902, further provides:

That all adulterated butter shall be packed by the manufacturer thereof in firkins, tubs, or other wooden packages not before used for that purpose, each containing not less than ten pounds, and marked, stamped, and branded as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall prescribe; and all sales made by manufacturers of adulterated butter shall be in original stamped packages.

Dealers in adulterated butter must sell only original or from original stamped packages, and when such original stamped packages are broken the adulterated butter sold from same shall be placed in suitable wooden or paper packages, which shall be marked and branded as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall prescribe. Every person who knowingly sells or offers for sale, or delivers or offers to deliver, any adulterated butter in any other form than in new wooden or paper packages as above described, or who packs in any package any adulterated butter in any manner contrary to law, or who falsely brands any package or affixes a stamp on any package denoting a less amount of tax than that required by law, shall be fined for each offense not more than one thousand dollars and be imprisoned not more than two years.

Regulations Concerning Oleomargarine made Applicable.

Pursuant to the above-quoted provisions of law, and in order to secure uniformity in the matter of marking, branding, and stamping packages containing articles taxable under said Act, the instructions relating to the marking, branding, and stamping of oleomargarine, so far as applicable, are hereby extended to packages containing adulterated butter as defined in Section 4 of said Act.

Caution Labels—To be Affixed to Packages Containing Adulterated Butter.

Section 4 of said Act also provides:

That every manufacturer of adulterated butter shall securely affix, by pasting, on each package containing adulterated butter

¹ For provisions made for inspecting, marking, and branding process or renovated butter, see Section 5 of Act of May 9, 1902.

manufactured by him a label on which shall be printed, besides number of the manufactory and the district and State in which situated, these words: "Notice.—That the manufacturer of adulterated butter herein contained has complied with all the requirements of law. Every person is cautioned not to use either package (for adulterated butter) again or the stamp thereon, nor to remove the contents of this package without destroying stamp, under the penalty provided by law in such cases."

manufacturer of adulterated butter who neglects to affix label to any package containing adulterated butter made by or sold or offered for sale for or by him, and every person removes any such label so affixed from any such package shall be fined fifty dollars for each package in respect to which offense is committed.

Instructions respecting the size of and manner of affixing like packages containing oleomargarine, are hereby extended and apply to packages containing adulterated butter.

Adulterated Butter for Export.¹

Every manufacturer's package of adulterated butter the law (Act of May 9, 1902) requires that there shall be securely pasting, a label, on which shall be printed the number of the package and the district and State in which it is situated, together with the following notice:

Notice.—That the manufacturer of the adulterated butter contained has complied with all the requirements of law. Every person is cautioned not to use either this package (for adulterated butter) again or the stamp thereon, nor to remove the contents of this package without destroying said stamp, under the penalty provided by law in such cases.

The label on which the above notice is to be printed is required to be not more than six inches long and not less than two and one-half inches in width, and the printing thereon must be in plain, open, bold letters, in black ink on white paper, and in addition to the requirements of law contain the words "For adulterated butter." The label will be in the following form:

Regulations governing the withdrawal free of tax for export of adulterated butter, see Regulations, No. 29.

Label for Adulterated Butter.

Factory No. —, — District, State of —.

Notice.—The manufacturer of the adulterated butter herein contained has complied with all the requirements of law. Every person is cautioned not to use either this package (for adulterated butter) again or the stamp thereon again, nor to remove the contents of this package without destroying said stamp, under the penalty provided by law in such cases.

The label must be securely affixed, by paste, across the side of the package in such a way as to be exposed to public view and easily read.

Tax on Adulterated, and Process or Renovated Butter.

Section 4 of said Act of May 9, 1902, provides:

That upon adulterated butter, when manufactured or sold or removed for consumption or use, there shall be assessed and collected a tax of ten cents per pound, to be paid by the manufacturer thereof, and any fractional part of a pound shall be taxed as a pound, and that upon process or renovated butter, when manufactured or sold or removed for consumption or use, there shall be assessed and collected a tax of one-fourth of one cent per pound, to be paid by the manufacturer thereof, and any fractional part of a pound shall be taxed as a pound. The tax to be levied by this section shall be represented by coupon stamps, and the provisions of existing laws governing engraving, issuing, sale, accountability, effacement, and destruction of stamps relating to tobacco and snuff, as far as applicable, are hereby made to apply to the stamps provided by this section.

That the provisions of Sections 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, and 21 of "An Act defining butter, also imposing a tax upon and regulating the manufacture, sale, importation, and exportation of oleomargarine," approved August 2, 1886, shall apply to manufacturers of "adulterated butter" to an extent necessary to enforce the marking, branding, identification, and regulation of the exportation and importation of adulterated butter.

Oleomargarine Regulations made Applicable to Adulterated Butter.

The provisions made in the foregoing regulations for the issuing, affixing, and canceling tax-paid stamps for oleomargarine, and for the inspection, sampling, exportation, or importation of that article, are hereby extended and made to apply to adulterated butter taxable under said Act of May 9, 1902.

Tax Paid Stamps.

appropriate tax-paid stamps to be affixed to packages containing adulterated butter (subject to a tax of ten cents per pound) and for packages containing process or renovated butter (subject to tax at the rate of one-fourth of one cent per pound) will be furnished to collectors upon application. While the Act does not prescribe the size of packages, process or renovated butter shall be packed, it provides that no fractional part of a pound shall be taxed as a pound. Coupon stamps for packages will be provided in denominations of ten, twenty, thirty, sixty, and one hundred pounds, each stamp having nine lines attached.

Export Stamps.

Export stamps for adulterated butter are printed in book form, each book containing four hundred stamps, and are issued to collectors upon application. These stamps are similar to the oleomargarine export stamps and must be filled out, affixed and canceled in like manner.

Collectors' Returns.

Each collector in whose district adulterated butter or process or renovated butter is manufactured will render monthly an account (in case of adulterated butter) on Form 504, and (in case of process or renovated butter) on Form 515, which account, in each case, will be reviewed and forwarded to the Commissioner of Internal Revenue, as part of his monthly oleomargarine account, Forms 516 and 517.

Retail dealers in process or renovated butter will not be required to keep books or render any returns in relation thereto until further notice.

As the law does not define a wholesale dealer in process or renovated butter, nor impose a special tax on such business, it is possible that it may be necessary for them to keep any books or render returns.

JOHN G. CAPERS,

Commissioner of Internal Revenue.

and:

J. B. REYNOLDS,

Acting Secretary of the Treasury.

APPENDIX L.

**REGULATIONS CONCERNING RENOVATED BUTTER
UNDER INTERNAL REVENUE ACT
APPROVED MAY 9, 1902.**

REVISED JULY, 1907.

Note.—All changes since July, 1907, have been inserted by the author in brackets.

RENOVATED BUTTER (OR "PROCESS BUTTER").**Section 4. Adulterated Butter Defined.**

Extracts from Act of May 9, 1902:

* * * * *

That for the purpose of this Act "butter" is hereby defined to mean an article of food as defined in "An Act defining butter, also imposing a tax upon and regulating the manufacture, sale, importation, and exportation of oleomargarine," approved August 2, 1886; that "adulterated butter" is hereby defined to mean a grade of butter produced by mixing, reworking, reurning in milk or cream, refining, or in any way producing a uniform, purified, or improved product from different lots or parcels of melted or unmelted butter or butter fat, in which any acid, alkali, chemical, or any substance whatever is introduced or used for the purpose or with the effect of deodorizing or removing therefrom rancidity, or any butter or butter fat with which there is mixed any substance foreign to butter as herein defined, with intent or effect of cheapening in cost the product or any butter in the manufacture or manipulation of which any process or material is used with intent or effect of causing the absorption of abnormal quantities of water, milk, or cream; that "process butter" or "renovated butter" is hereby defined to mean butter which has been subjected to any process by which it is melted, clarified, or refined and made to resemble genuine butter, always excepting "adulterated butter" as defined by this Act.

Special Taxes.

That special taxes are imposed as follows:

Manufacturers of process or renovated butter shall pay fifty dollars per year and manufacturers of adulterated butter shall pay six hundred dollars per year. Every person who engages in the production of process or renovated butter or adulterated butter as a business shall be considered to be a manufacturer thereof.

* * * * *

Penalty for Selling Adulterated Butter.

Every person who sells adulterated butter shall be regarded dealer in adulterated butter. And Sections 3232, 3233, 3234, , 3236, 3237, 3238, 3239, 3240, 3241, 3243 of the Revised utes of the United States are, so far as applicable, made to ad to and include and apply to the special taxes imposed by section and to the person upon whom they are imposed.

Manufacturer—Penalty.

That every person who carries on the business of a manu- rurer of process or renovated butter or adulterated butter out having paid the special tax therefor, as required by law, , besides being liable to the payment of the tax, be fined not than one thousand and not more than five thousand dollars; every person who carries on the business of a dealer in adul- ed butter, without having paid the special tax therefor, as red by law, shall, besides being liable to the payment of the be fined not less than fifty nor more than five hundred rs for each offense.

Filing Notice with Collector of Internal Revenue—Bond.

That every manufacturer of process or renovated butter or erated butter shall file with the collector of internal revenue e district in which his manufactory is located such notices, tories, and bonds, shall keep such books and render such is of material and products, shall put up such signs and affix number of his factory, and conduct his business under such llance of officers and agents as the Commissioner of Internal ue, with the approval of the Secretary of the Treasury, y regulation require. But the bond required of such manu- er shall be with sureties satisfactory to the collector of al revenue, and in a penal sum of not less than five hundred s and the sum of said bond may be increased from time to and additional sureties required at the discretion of the or under instructions of the Commissioner of Internal ue.

* * * * *

upon process or renovated butter, when manufactured or r removed for consumption or use, there shall be assessed ollected a tax of one-fourth of one cent per pound, to be y the manufacturer thereof, and any fractional part of a shall be taxed as a pound. The tax to be levied by this sec- all be represented by coupon stamps, and the provisions of g laws governing engraving, issuing, sale, accountability,

effacement, and destruction of stamps relating to tobacco and snuff, as far as applicable, are hereby made to apply to stamps provided by this section.

Section 5. Inspection—Marking—Regulations—Penalty.

All parts of an Act providing for an inspection of meats for exportation, approved August 30, 1890, and of an Act to provide for the inspection of live cattle, hogs, and the carcasses and products thereof which are the subjects of interstate commerce, approved March 3, 1891, and of amendment thereto approved March 2, 1895, which are applicable to the subjects and purposes described in this section shall apply to process or renovated butter. And the Secretary of Agriculture is hereby authorized and required to cause a rigid sanitary inspection to be made, at such times as he may deem proper or necessary, of all factories and storehouses where process or renovated butter is manufactured, packed, or prepared for market, and of the products thereof and materials going into the manufacture of the same. All process or renovated butter and the packages containing the same shall be marked with the words "Renovated Butter" or "Process Butter" and by such other marks, labels, or brands and in such manner as may be prescribed by the Secretary of Agriculture, and no process or renovated butter shall be shipped or transported from its place of manufacture into any other State or Territory or the District of Columbia, or to any foreign country, until it has been marked as provided in this section. The Secretary of Agriculture shall make all needful regulations for carrying this section into effect, and shall cause to be ascertained and reported from time to time the quantity and quality of process or renovated butter manufactured, and the character and the condition of the material from which it is made. And he shall also have power to ascertain whether or not materials used in the manufacture of said process or renovated butter are deleterious to health or unwholesome in the finished product, and in case such deleterious or unwholesome materials are found to be used in product intended for exportation or shipment into other States or in course of exportation or shipment he shall have power to confiscate the same. Any person, firm, or corporation violating any of the provisions of this section shall be deemed guilty of a misdemeanor and on conviction thereof shall be punished by a fine of not less than fifty dollars nor more than five hundred dollars or by imprisonment not less than one month nor more than six months, or by both said punishments, in the discretion of the court.

**REGULATIONS PRESCRIBED IN REGARD TO "RENOVATED BUTTER,"
IN ACCORDANCE WITH THE ACT OF CONGRESS
APPROVED MAY 9, 1902.**

Regulation 1. Terms.

The Act of May 9, 1902, gives to the manufacturer of renovated or process butter the option to call the product "renovated butter" or to call it "process butter."

For the sake of brevity the words "renovated butter" are used in these regulations as synonymous with the words "process butter." Therefore, any marking or branding with the words "renovated butter," required by these regulations, will be satisfied if the words "process butter" be used in lieu of the words "renovated butter."

Regulation 2. Definition of Renovated Butter.

The following explanation of the definition of renovated butter, as it occurs in the law, is adopted for guidance in connection with these regulations:

(a) This grade or kind of butter may be made from one or more lots or parcels of butter, which has been or have been "subjected to any process by which it is melted, clarified, or refined, and made to resemble genuine butter, always excepting 'adulterated butter,' as defined by this Act." It may or may not have common salt and harmless artificial coloring added.

(b) The law defines three processes of refining butter, which, if used, make the resultant article adulterated butter, in contradistinction to renovated butter, as follows:

First, if in any way, any acid, alkali, chemical, or any substance whatever is introduced or used for the purpose or with the effect of deodorizing or removing therefrom rancidity; second, if there is mixed any substance foreign to butter with intent or effect of cheapening in cost the product; and third, if, in any way, the product is made to contain abnormal quantities of water, milk, or cream.

Butter which has been renovated and has sixteen percent or more of moisture will be held to contain abnormal quantities of water, milk, or cream, and will, therefore, be classed as adulterated butter.

Regulation 3. Manufacturers Defined.

Section 4 of the Act of May 9, 1902, provides:

Manufacturers of process or renovated butter shall pay fifty dollars per year . . . Every person who engages in the production of process or renovated butter . . . as a business shall be considered to be a manufacturer thereof.

The special-tax year begins July 1st. The special tax of manufacturers who commence business in the month of July will be reckoned for one year, and the tax of manufacturers who commence business after the month of July will be reckoned proportionately from the first day of the month from which the liability to special tax commenced to the first day of July following.

Regulation 4. Registration—Stamp Tax.

Every manufacturer of renovated butter, before commencing business (or at least within the month in which liability to special tax commenced), must register with the collector of the district in which the business is to be carried on, his name, or firm or corporate name, place of residence, nature of business, and the place where such business is to be carried on, and procure a special-tax stamp at the rate of fifty dollars per annum, which stamp he shall place and keep conspicuously posted in his establishment or place of business; and on the first day of July in each year he must again so register and procure a new special-tax stamp and post it as above stated.

Regulation 5. Notice—Bond.

Every manufacturer of renovated butter will be required to file with the collector a notice on Form 507, together with an inventory, Form 509, when making application for special-tax stamp as manufacturer. At the same time he will file a bond, Form 508, in a penal sum to be fixed by the collector of internal revenue for his district, but in no case less than five hundred dollars.

Collectors of internal revenue will decline to approve the bond of a manufacturer of renovated butter until they are satisfied that the premises to be used for the manufacture of that article are entirely separate from those used for the manufacture of adulterated butter or oleomargarine, or for the handling or manipulation of butter not taxable under the Act of May 9, 1902. (See Treas. Dec. No. 588, Oct 6, 1902.)

Regulation 6. Factory Number.

Collectors will give to each manufacturer of renovated butter in their respective districts a factory number, the numbers to be consecutive and not thereafter changed. A new number should be given to a new factory. The change in ownership of a factory does not necessitate a change in the factory number.

Regulation 7. Sign on Factory.

Every manufacturer of renovated butter shall place and keep over the principal entrance of the factory wherein his business is carried on, so

it can be distinctly seen, a sign, with letters thereon not less than e inches in height, printed in oil colors or gilded, giving his full e and business and the number of his factory, as follows:

A———— B————

MANUFACTURER OF RENOVATED BUTTER.

Factory No. ———.

Regulation 8. Tax Coupon Stamps.

Under the provisions of Section 4 of Act of May 9, 1902, the tax one-fourth of one cent per pound imposed thereby on renovated butter to be represented by coupon stamps, to be provided by the Commissioner Internal Revenue as authorized by existing laws. A fractional part a pound shall be taxed as a pound.

Regulation 9. Stamp Denominations.

For this purpose tax-paid stamps will be furnished in denominations f ten, twenty, thirty, forty, fifty, sixty, and one hundred pounds, each tamp bearing nine coupons. Such stamps must contain the name of the collector, his district and State, and show thereon the date of payment of the tax, the number of pounds, and the number of the factory.

Regulation 10. Affixing Stamps—Cancelling Stamps.

On the withdrawal of a package of renovated butter the proper tax-paid stamp must be affixed thereto by the manufacturer, by the use of adhesive material, and if the package be of wood, not less than five tacks must be driven through each stamp, one in each corner and one in the middle of the stamp. The stamp when so affixed must be immediately cancelled. The blank spaces reserved for the manufacturer must be properly filled up by him in accordance with the plain requirements of the form of the stamp. This is not optional with the manufacturer, but a requirement. In the blank space in the lower left-hand corner of the stamp must be inserted the date when the stamp was affixed and cancelled. This is required to be done before the renovated butter is removed from the factory. The date of issue must be entered on the stamp by the collector at the time the same is issued.

For the purpose of cancellation the manufacturer will use a stencil plate or rubber stamp, by which there shall be printed five parallel waved lines long enough to extend beyond each side of the stamp onto the package. The printing on the stamp must be plain and distinct, and the waved lines must be fine enough to avoid obliterating the reading matter and figures contained in the tax-paid stamp. The cancelling must be with

blackening or other durable material over and across the stamp and in such manner as not to daub and make it illegible.

Regulation 11. Affixing Stamps.

The stamp must be affixed to the side of the package, to a smooth surface, in such a manner as to be readily cancelled in the manner above described. When a package contains a number of pounds between ten and twenty, a ten-pound stamp with the necessary number of coupons attached will be issued to cover the net weight. Packages containing more than twenty pounds and less than thirty pounds will have attached a twenty-pound stamp with a suitable number of coupons to represent the contents. Larger-sized packages will be similarly stamped.

Regulation 12. Label.

Every manufacturer's package of renovated butter shall have affixed thereto a label on which shall be printed the number of the factory and the revenue district and State in which it is located, together with the following notice:

FORM FOR RENOVATED BUTTER.

Factory No. —, — district, State of —.

Notice.—The manufacturer of the renovated butter herein contained has complied with all the requirements of the law and the regulations authorized thereby. Every person is cautioned not to use again either this package for renovated butter or tax stamp thereon or to remove the contents of this package without destroying said stamp, under penalty provided by law in such cases.

This label or notice shall be printed in black upon white paper and shall be not less than five nor more than seven inches long and not less than three inches in width. The label must be securely affixed by paste to the side of the package and opposite or on a different side (not the top or bottom) from that to which the tax stamp is attached and in such a way as to be exposed to view and easily read. The words "Renovated butter" in this notice must be printed in one or two lines and in plain gothic letters at least three-eighths inch square. There must also be plainly marked or stenciled on the outside of every package the gross, tare, and net weight in pounds.

Regulation 13. Manufacturer Keeping Books.

Each manufacturer of renovated butter is required to keep books and make returns showing the quantity of materials received on the

premises and the quantity of finished product removed therefrom. pages of book (Form No. 511) to be kept by the manufacturers furnished to collectors, but the book must be provided by the manufacturer, as the same is not supplied by the government.

Regulation 14. Monthly Returns, Form.

Form No. 499 has been prescribed for monthly returns of manufacturers of renovated butter, and such forms will be furnished through collectors of internal revenue.

In preparing Form 499 manufacturers should note on pages 1 and 2, quantities of materials used in producing renovated butter each month and the quantity produced. On page 2 is a space for a special account or tax-paid renovated butter returned to the manufacturer.

On inside pages of Form 499 should be noted the date when butter is sold, removed, or destroyed, together with the amount in casks and pounds; also to whom sold or consigned, giving the place of business, residence, county, and State.

The last page of this Form contains a recapitulation of the quantity of renovated butter produced and disposed of during the month and quantity on hand at the beginning and at the end of each month. It should be prepared with great care. The certificate in this form is to be executed by the manufacturer, or his duly authorized representative, and be sworn to before a deputy collector or an officer authorized to administer oaths generally.

Regulation 15. Removing Tax Stamp from Empty Package.

Whenever any manufacturer's package of renovated butter is empty it shall be the duty of the person who removes the contents thereof to remove utterly the tax-paid stamp on each empty package. Any person in his possession empty renovated butter packages the tax-paid stamps on which have not been destroyed will be liable to a heavy

fine. Original packages of renovated butter for export only may be covered with cloth, jute, or burlap, provided that there be stenciled on the cover of the package, in black letters on a white background, the words "Renovated Butter," in one or two lines, in full-faced, gothic letters not less than one inch square. The words "For export only" must appear in a line one inch below the words "Renovated Butter," in full-faced letters not less than three-eighths of an inch square.

These markings are to be the only markings on one side or surface of the package.

Where possible, inspection will be made before the outer covering is placed on the packages. If, however, inspection is necessary after the coverings have been placed on the packages, the exporter, or his

agent, will be required to remove the outer covering from any or all packages designated by the inspector.

Nothing in this regulation shall be deemed to change or dispense with the requirement of Regulation 25 hereof in any way. As amended September 22, 1908. T. D. 1417.]

The ruling by the Commissioner of Internal Revenue, under date of October 6, 1902, permitting the shipment of original packages of renovated butter covered with jute, burlap, or heavy paper from the place of manufacture or place of business of the wholesale dealer is hereby revoked, and all packages of renovated butter so covered or wrapped which may be found on the market on and after the date these regulations become effective will not be deemed in compliance with the law.

Regulation 16. Exportation Free of Tax.

Attention is called to the fact that the Act named makes no provision for the exportation, free of tax, of renovated butter, nor any drawback on such articles when exported. Consequently all renovated butter for export must be stamped the same as for domestic market.

The Act of May 9, 1902, neither defines nor imposes special taxes upon wholesale or retail dealers in renovated butter. Renovated butter must always bear or be accompanied by the evidence that the manufacturer's tax thereon has been paid.

Regulation 17. Inspecting Factories.

Officers or agents of the Department of Agriculture shall make a rigid sanitary inspection of all factories and storehouses where renovated butter is manufactured, packed, or prepared for market. The time of such inspection shall be at the discretion of the Secretary of Agriculture. Full report covering the sanitary conditions shall be made to the Secretary of Agriculture.

Regulation 18. Inspecting Materials.

Inspection shall also be made of the materials going into the manufacture of renovated butter and the product thereof, and the inspector shall report the quantity and quality of renovated butter manufactured and the character and the condition of the materials from which it is made. If materials used in the manufacture of renovated butter are deleterious to health or unwholesome in the finished product, they shall be confiscated.

Regulation 19. When Adulterated.

According to the Food and Drugs Act of June 30, 1906, if renovated butter consists in whole or in part of a filthy, decomposed, or putrid

animal or vegetable substance it shall be deemed adulterated under that Act.

Regulation 20. Branding Packages.

Each manufacturer's package containing ten pounds or more solid packed renovated butter must have branded into the upper surface of the renovated butter the words "Renovated butter," in one or two lines, the letters to be gothic style, not less than one-half inch square, and depressed not less than one-eighth of an inch. Prints, bricks, or rolls must be similarly branded, the letters to be not less than three-eighths inch square.

Regulation 21. Wrappers.

All coverings or wrappers of prints, bricks, or rolls of renovated butter, whether paper or cloth, must have the words "Renovated butter," in one or two lines, marked, branded, stenciled, or printed thereon in black or nearly black upon white or light ground, in full-faced gothic letters, not less than three-eighths inch square, so placed as to be the only marking upon one side or surface of the parcel so packed.

Regulation 22. Approval of Marks and Labels.

Any marks, brands, or labels other than those mentioned in these Regulations, with the exception of the shipping marks used in commerce, must be approved by the Secretary of Agriculture before such marks, brands, or labels may be used by the manufacturers.

Regulation 23. Filing Copies with Department.

Copies of all approved marks, brands, or labels must be kept on file and accessible to the officer or agent of the Department of Agriculture, at the office or place of business of the manufacturer.

Regulation 24. Food and Drugs Act of 1906.

While the Act of May 9, 1902, does not give the Secretary of Agriculture authority to prescribe regulations for marking or branding other than manufacturers' packages, the Food and Drugs Act of June 30, 1906, prohibits the misbranding of all food articles entering into interstate commerce. An article is misbranded in the following cases:

First. If it be an imitation of or offered for sale under the distinctive name of another article.

Second. If it be labeled or branded so as to deceive or mislead the purchaser.

Third. If in package form, and the contents are stated in terms of

weight or measure, they are not plainly and correctly stated on the outside of the package.

Fourth. If the package containing it or its label shall bear any statement, design, or device regarding the ingredients of the substances contained therein, which statement, design, or device shall be false or misleading in any particular.

Regulation 25. Branding Renovated Butter for Export.

Renovated Butter for export must be marked and branded as for the domestic market. All renovated butter offered for export must be inspected by duly authorized officers or agents of the Department of Agriculture. After such officer has determined its purity, quality, and grade, he shall, if said renovated butter be found pure and properly branded and marked, issue a certificate setting forth these facts.

Regulation 26. Reports Concerning Renovated Butter Found on Market.

Officers of the Department of Agriculture finding renovated butter on the market not bearing evidence that the tax thereon has been paid, or without the caution notice required, or butter suspected of being renovated or adulterated, will report the facts in the case to the nearest internal-revenue officer, and, if necessary, secure samples of the suspected product for transmission to the laboratory of the Internal Revenue Bureau for chemical analysis. Likewise, revenue officers finding renovated butter on the market which does not comply with these regulations should promptly notify the Department of Agriculture, or its nearest representative, of the location of such butter and the facts relating thereto.

Regulation 27. Samples, How Taken.

The following directions are given for taking samples of suspected butter:

At least a pound sample should be taken, which should be made up of portions taken from various parts of the package by means of a spoon or trier. This sample should be at once transferred to the container in which it is to be shipped, which must be water-tight and perfectly dry. All wrappings of any kind must be removed before the sample is placed in the container.

Glass fruit jars with tops that can be screwed down upon rubber rings, or tin fruit cans, with tops that can be readily soldered on, are satisfactory and readily obtainable.

The container must be marked so that it can be identified by the officer taking the sample and it must be accompanied with a full description of the sample as to origin and suspected adulteration, either as a letter of transmittal or with the sample.

The proper sealing and shipping of the sample is of great importance, for if the analyst can not testify that it was received with seals unbroken the evidence is always open to attack.

The sealing is best accomplished by placing the vessel containing the substance in a box or other suitable receptacle, and securing the latter with string or tape in such a manner that the package can not be opened without cutting or untying the tape; the knots and intersections of the latter should then be covered with sealing wax and impressed by means of a broad die bearing letters or characters easily recognized.

The sealing of the bottle or vessel itself is not desirable, as the wax is likely to get into the sample when it is opened. The sealed box may then be enclosed in another box for shipment, if desirable. The method of sealing ordinarily used by express agents will be satisfactory if it is done in the presence of the officer transmitting the sample, and may be applied to the outer box, no other sealing being necessary. This is the most convenient and economical method when a number of samples are transmitted at one time by express.

Samples should be addressed to the Commissioner of Internal Revenue, care of Laboratory, Washington, D. C.

Regulation 28. Definition of "Adulterated" Explained.

The word "adulterated," herein used under the Act of May 9, 1902, refers to the definition of the taxable article as given in Regulation 2, while the same word employed in the Food and Drugs Act of June 30, 1906, has reference to the classification under that Act.

Regulation 29. Correspondence.

Correspondence and all administrative details under the Regulations numbered 3 to 16, inclusive, above, are assigned to the Commissioner of Internal Revenue, Treasury Department. All matters under Regulations 17 to 26, inclusive, are assigned to the Chief of the Bureau of Animal Industry, Department of Agriculture.

Regulation 30. To Become Effective, When.

These regulations shall become and be effective on and after August 15, 1907.

JOHN G. CAPERS,
Commissioner of Internal Revenue.

Approved:

GEO. B. CORTELYOU,
Secretary of the Treasury.

JAMES WILSON,
Secretary of Agriculture.

July 2, 1907.

(T. D. 1498.)

ADULTERATED BUTTER.

Modification of regulations relating to procuring samples of adulterated butter, and permitting payment of tax due on adulterated butter under seizure by the owner or custodian of the same.

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C., May 17, 1909.

To Collectors, Internal-Revenue Agents, and Others:

Upon representations by a committee of those engaged in the butter trade, and after a careful investigation into the subject through officers and agents of this Bureau in the field, the conclusion has been reached that under the conditions existing the inspection, sampling, seizure, and formalities incident to the enforcement of the Act of May 9, 1902, defining and imposing a tax upon butter as adulterated which contains an abnormal percent of moisture, have in many cases worked a hardship upon those engaged in this industry, and to obviate this it has been decided to adopt the following plan for the execution of this work in the future:

First, no samples of butter which, upon preliminary tests by the officers taking the same, show less than sixteen percent of moisture should be forwarded to the laboratory of this office, and only one sample out of every ten, or from every tenth package, found to contain abnormal moisture, if the owner of the butter agrees to accept the preliminary test as conclusive, will be so forwarded; otherwise a sample out of every package will be taken and submitted to this office. The samples taken by officers for the preliminary tests should not exceed three ounces in quantity, while those to be forwarded to the laboratory of this office should not exceed one-half pound, taken after the method or manner prescribed in T. D. 1449 of January 2, 1909. The preliminary tests should be made immediately by those taking the samples, and if found to be less than sixteen percent moisture the goods should be at once released, provided detention or seizure has formally, or by agreement, been made.

Second, for the purpose of relieving those in the butter trade of the loss or burden through the delay and formalities incident to forwarding samples to this office for analysis, formal seizures of the butter found upon the preliminary tests to contain sixteen percent or more of moisture, and its detention until payment of the tax thereon has been made, officers are instructed to release all the butter thus found to be adulterated upon the payment of the tax due thereon by the ostensible owner or person in whose custody the same shall be, upon condition that said butter shall be reworked and the excess of moisture removed therefrom before the same is sold.

Goods may be thus released without waiting for the report of the

official chemist upon the sample forwarded to this office, which, if corroborative of the preliminary test, would in no wise affect the status of the case, but if in contradiction to the preliminary test analysis proved that the butter did not contain abnormal moisture a claim for the refund of the amount overpaid will be entertained upon presentation through the office of the collector to whom such overpayment was made. Collectors will be required to see that adulterated butter so released is not placed on the market for sale until the excess of moisture is removed or proper steps taken for the necessary reworking.

Officers taking samples of butter are directed to use great care to avoid mutilation and consequent loss to the owners of the goods sampled, and they are authorized to pay for the actual quantity taken and found to be not adulterated at the current wholesale price of the particular grade or brand of goods and include this expenditure in their accounts. In all cases before taking samples officers should notify the owners of the butter, or the person having custody of the same, of their intention to sample the goods, so as to allow the owners to be present, and also to take samples of the butter in question, if they so desire, but as these duplicate samples will not be necessary in the government test the expense of same will have to be borne by the owner.

All rules or decisions heretofore published in conflict with the above are hereby modified and revoked insofar as is necessary. A strict compliance with this decision by the officers in the field charged with the enforcement of the law will obviate much of the delay and burden complained of by those engaged in the butter business.

ROBT. WILLIAMS, JR.,
Acting Commissioner.

Approved:

FRANKLIN MACVEAGH,
Secretary of the Treasury.

(T. D. 1576.)

ADULTERATED BUTTER.

Acceptance by holders or owners of butter of preliminary tests showing excessive moisture, on payment of tax and to secure immediate release of such butter, should be duly executed in writing and a copy thereof forwarded to the office of the Commissioner of Internal Revenue. Samples from every tenth package found to be adulterated should also be forwarded, even though acceptance is made of preliminary tests.

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C., December 21, 1909.

To Collectors of Internal Revenue, Revenue Agents, and Others Concerned:
Attention is called to the provisions of T. D. 1498, dated May 17,

1909, providing for the release of butter found upon preliminary tests by officers in the field to contain abnormal moisture, on payment of the tax due on amount thus shown to be adulterated and its return to the factory to be put in legal condition.

This decision further provided that no samples which "show less than sixteen percent of moisture should be forwarded to the laboratory of this office, and only one sample out of every ten or from every tenth package found to contain abnormal moisture, if the owner of the butter agrees to accept the preliminary test as conclusive, will be so forwarded; otherwise a sample out of every package will be taken and submitted to this office."

The above ruling was intended to relieve the butter trade of the delay incident to the forwarding of samples to this office, and perhaps depreciation of the product in value, pending analysis and formal release of the goods, but it was not intended to do away with the forwarding of samples out of every tenth package containing abnormal moisture if the preliminary tests are accepted. In all cases where such tests are accepted by the holders or owners of the butter, a sample from every tenth package found to be adulterated should be forwarded, even though the butter is released upon agreement.

This agreement should be duly executed in writing and a copy thereof forwarded for file in this office.

ROYAL E. CABELL, Commissioner.

[The tax of ten cents per pound on butter found to contain sixteen percent or more of moisture is due when "manufactured or sold or removed for consumption or use," and will be assessed after removal of the product from the factory, whether discovered or in storage or not. T. D. 1522.]

Notice of Violation of Rules.

[If an officer of the Department of Agriculture finds a package of renovated butter without a revenue stamp he must inform the owner not to dispose of or remove such butter, and then inform the nearest internal revenue officer of the fact. So any officer of the internal revenue who finds renovated butter that does not comply with the rules of the Agricultural Department must promptly notify such Department or its nearest representative, of the location of such butter and the facts relating to it. (Internal Revenue Decisions 625, 641.)]

How Handled by Jobbers—Unpacking.

Jobbers and wholesalers can handle renovated butter only in the original manufacturer's packages, and dispose of it without breaking those packages for any purpose or in any way changing the form and markings. A package can not be emptied for the purpose of using while

moving in trade between the factory and the retailer. (Internal Revenue Decision 654.)

Seizure.

The Commissioner of Internal Revenue has power to make and enforce a regulation requiring the seizure and forfeiture of renovated butter, removed by retail dealers from original packages and kept on sale outside such packages. (Internal Revenue Decision 847.) Where the tax on renovated butter has been regularly paid and the butter is stamped and separated from the original packages in the hands of dealers, it is not seized. (Internal Revenue Decision 864.)

Tax.

"Creamery butter," "ladled butter," "whey butter," and "sweet butter" classed as "adulterated butter" is taxable at ten cents per pound when made to contain moisture to the extent of sixteen percent or more. (T. D. 1009. *Coopersville Co-operative Creamery Co. v. Lemon*, 89 C. C. A. 595, 163 Fed. 145, T. D. 1371.)

Merchants selling butter found to contain sixteen percent or more of moisture on contract and not upon commission are held to make an outright purchase and are liable to the special tax. The manufacturer is not. (T. D. 1247.)

When a merchant or broker has become the actual owner of adulterated butter, by purchase or otherwise, and has sold it for his own account, the liability to a special tax as a dealer is his, and is reported by revenue agents and collectors for assessment. If the sales are made by the manufacturer through an agent, broker or commission merchant, for the account of the manufacturer, the tax as a dealer is reported against such manufacturer and not as against the agent so selling. (T. D. 1238.)

State. Laws.

Renovated or adulterated butter or imitation cheese, is subject to the requirements of the laws of the State or Territory or the District of Columbia into which it is transported and remains therein for use, consumption, sale or storage. Act May 9, 1902. (T. D. 1240.)

Power to Adopt Regulations.

Congress had the power to authorize the Secretary of the Treasury to adopt the regulations he did on the subject of adulterated butter, and the rule providing that butter having sixteen percent or more of moisture contains an abnormal quantity and is adulterated butter as valid. *Coopersville Co-operative Creamery Co. v. Lemon*, 89 C. C. A. 595, 163 Fed. 145, T. D. 1371.

Intent to Make Adulterated Butter.

The question whether the manufacturer intended to make adulterated butter is not material if the process had that effect. *Cooperville Co-operative Co. v. Lemon*, 89 C. C. A. 595, 163 Fed. 145, T. D. 1371.

Water in Butter, Adulteration.

If by absorption of a quantity of moisture which added to that already in the butter the percentage of the gross amount of water reaches sixteen percent or over, the butter is adulterated. *Cooperville Co-operative Creamery Co. v. Lemon*, 89 C. C. A. 595, 163 Fed. 145, T. D. 1371.

Forwarding Samples.

Samples of butter, which on preliminary or unofficial tests are shown to contain excessive moisture should be forwarded by the official making the test for official analysis by the Division of Chemistry of the Treasury Department. (T. D. 1421.)

Samples Forwarded.

Officers must secure more than one sample from unbroken original packages, if possible, before recommending an assessment of taxes, and samples from partly emptied or retail packages are forwarded to the Commissioner of Internal Revenue only as corroborative evidence. (T. D. 1539.)

Release.

Acceptance by holders or owners of butter of preliminary tests showing excessive moisture, on payment of the tax to secure immediate release of such butter, must duly execute the prescribed form and a copy thereof be forwarded to the office of Commissioner of Internal Revenue.

Samples Forwarded.

Samples from every tenth package found to be adulterated must also be forwarded, even though acceptance is made of the preliminary tests. (T. D. 1576.)

Tax, When Due.

The tax of ten cents per pound on butter found to contain sixteen percent or more of moisture is due when "manufactured or sold or removed for consumption or use," and is assessed by the Commissioner of Internal Revenue after the removal of the product from the factory, whether discovered in transit or storage.]

APPENDIX M.**MEAT INSPECTION.**

Note.—This is the pamphlet issued by the United States government. Additions by the author are inserted in brackets.

Extract from an Act of Congress entitled "An Act making appropriations for the Department of Agriculture for the fiscal year ending June 30, 1907," approved March 4, 1907. (34 U. S. Stat. at Large 1260.)

THE MEAT-INSPECTION AMENDMENT.

[SECTION 1. *Inspectors—Inspections.*] That, hereafter, for the purpose of preventing the use in interstate or foreign commerce, as hereafter provided, of meat and meat food products which are unsound, unhealthful, unwholesome, or otherwise unfit for human food, the Secretary of Agriculture, at his discretion, may cause to be made, by inspectors appointed for that purpose, an examination and inspection of all cattle, sheep, swine, and goats before they shall be allowed to enter into any slaughtering, packing, meat-canning, rendering, or similar establishment, in which they are to be slaughtered and the meat and meat food products thereof are to be used in interstate or foreign commerce; and all cattle, swine, sheep, and goats found on such inspection to show symptoms of disease shall be set apart and slaughtered separately from all other cattle, sheep, swine, or goats, and when so slaughtered the carcasses of said cattle, sheep, swine, or goats, shall be subject to a careful examination and inspection, all as provided by the rules and regulations to be prescribed by the Secretary of Agriculture as herein provided for. [34 Stat. at Large 1260.]

[SEC. 2. *Inspection—Marking—Condemned Meat Destruction.*] That for the purposes hereinbefore set forth the Secretary of Agriculture shall cause to be made by inspectors appointed for that purpose, as hereinafter provided, a post-mortem examination and inspection of the carcasses and parts thereof of all cattle, sheep, swine, and goats to be prepared for human consumption at any slaughtering, meat-canning, salting, packing, rendering, or similar establishment in any State, Territory, or the District of Columbia for transportation or sale as articles of interstate or foreign commerce; and the carcasses and parts thereof of all such animals found to be sound, healthful, wholesome, and fit for human food shall be marked, stamped, tagged, or labeled as "Inspected and Passed;" and said inspectors shall label, mark, stamp, or tag as "Inspected and Condemned," all carcasses and parts thereof of animals found to be unsound, unhealthful, unwholesome, or otherwise unfit for human food; and all carcasses and parts thereof thus inspected and condemned shall be destroyed for food purposes by the said establishment in the presence of an inspector, and the Secretary of Agriculture may remove inspectors from any such establishment which fails to so destroy any such condemned

carcass or part thereof, and said inspectors, after said first inspection shall, when they deem it necessary, reinspect said carcasses or parts thereof to determine whether since the first inspection the same have become unsound, unhealthful, unwholesome, or in any way unfit for human food, and if any carcass or any part thereof shall, upon examination and inspection subsequent to the first examination and inspection, be found to be unsound, unhealthful, unwholesome, or otherwise unfit for human food, it shall be destroyed for food purposes by the said establishment in the presence of an inspector, and the Secretary of Agriculture may remove inspectors from any establishment which fails to so destroy any such condemned carcass or part thereof. [34 Stat. at Large 1261.]

[SEC. 3. *Application of Statute.*] The foregoing provisions shall apply to all carcasses or parts of carcasses of cattle, sheep, swine, and goats, or the meat or meat products thereof which may be brought into any slaughtering, meat-canning, salting, packing, rendering, or similar establishment, and such examination and inspection shall be had before the said carcasses or parts thereof shall be allowed to enter into any department wherein the same are to be treated and prepared for meat food products; and the foregoing provisions shall also apply to all such products which, after having been issued from any slaughtering, meat-canning, salting, packing, rendering, or similar establishment, shall be returned to the same or to any similar establishment where such inspection is maintained. [34 Stat. at Large 1261.]

[SEC. 4. *Access to Establishments—Branding—Packing for Foreign Purchasers.*] That for the purposes hereinbefore set forth the Secretary of Agriculture shall cause to be made by inspectors appointed for that purpose an examination and inspection of all meat food products prepared for interstate or foreign commerce in any slaughtering, meat-canning, salting, packing, rendering, or similar establishment, and for the purposes of any examination and inspection said inspectors shall have access at all times, by day or night, whether the establishment be operated or not, to every part of said establishment; and said inspectors shall mark, stamp, tag, or label as "Inspected and Passed" all such products found to be sound, healthful, and wholesome, and which contain no dyes, chemicals, preservatives, or ingredients which render such meat or meat food products unsound, unhealthful, unwholesome, or unfit for human food; and said inspectors shall label, mark, stamp, or tag as "Inspected and Condemned" all such products found unsound, unhealthful, and unwholesome, or which contain dyes, chemicals, preservatives, or ingredients which render such meat or meat food products unsound, unhealthful, unwholesome, or unfit for human food, and all such condemned meat food products shall be destroyed for food purposes, as hereinbefore provided, and the Secretary of Agriculture may remove inspectors from any establishment which fails to so destroy such condemned meat food products: *Provided*, That, subject to the rules and regulations of the Secretary of Agriculture, the provisions hereof in regard to preservatives shall not apply to meat

food products for export to any foreign country and which are prepared or packed according to the specifications or directions of the foreign purchaser, when no substance is used in the preparation or packing thereof in conflict with the laws of the foreign country to which said article is to be exported; but if said article shall be in fact sold or offered for sale for domestic use or consumption, then this proviso shall not exempt said article from the operation of all the other provisions of this Act. [34 Stat. at Large 1261.]

[SEC. 5. *Form of Label.*] That when any meat food product prepared for interstate or foreign commerce which has been inspected as hereinbefore provided and marked "Inspected and Passed" shall be placed or packed in any can, pot, tin, canvas, or other receptacle or covering in any establishment where inspection under the provisions of this Act is maintained, the person, firm, or corporation preparing said product shall cause a label to be attached to said can, pot, tin, canvas, or other receptacle or covering, under the supervision of an inspector, which label shall state that the contents thereof have been "Inspected and Passed" under the provisions of this Act; and no inspection and examination of meat or meat food products deposited or inclosed in cans, tins, pots, canvas, or other receptacle or covering in any establishment where inspection under the provisions of this Act is maintained shall be deemed to be complete until such meat or meat food products have been sealed or inclosed in said can, tin, pot, canvas, or other receptacle or covering under the supervision of an inspector, and no such meat or meat food products shall be sold or offered for sale by any person, firm, or corporation in interstate or foreign commerce under any false or deceptive name; but established trade name or names which are usual to such products and which are not false and deceptive and which shall be approved by the Secretary of Agriculture are permitted. [34 Stat. at Large 1262.]

[SEC. 6. *Inspection—Regulations.*] The Secretary of Agriculture shall cause to be made, by experts in sanitation or by other competent inspectors, such inspection of all slaughtering, meat-canning, salting, packing, rendering, or similar establishments in which cattle, sheep, swine, and goats are slaughtered and the meat and meat food products thereof are prepared for interstate or foreign commerce as may be necessary to inform himself concerning the sanitary conditions of the same, and to prescribe the rules and regulations of sanitation under which such establishments shall be maintained; and where the sanitary conditions of any such establishment are such that the meat or meat food products are rendered unclean, unsound, unhealthful, unwholesome, or otherwise unfit for human food, he shall refuse to allow said meat or meat food products to be labeled, marked, stamped, or tagged as "Inspected and Passed." [34 Stat. at Large 1262.]

[SEC. 7. *Inspection.*] That the Secretary of Agriculture shall cause an examination and inspection of all cattle, sheep, swine, and goats, and the food products thereof, slaughtered and prepared in the establishments.

hereinbefore described for the purposes of interstate or foreign commerce to be made during the nighttime as well as during the daytime when the slaughtering of said cattle, sheep, swine, and goats, or the preparation of said food products is conducted during the nighttime. [34 Stat. at Large 1262.]

[SEC. 8. *Transportation Forbidden.*] That on and after October 1, 1906, no person, firm, or corporation shall transport or offer for transportation, and no carrier of interstate or foreign commerce shall transport or receive for transportation from one State or Territory or the District of Columbia to any other State or Territory or the District of Columbia, or to any place under the jurisdiction of the United States, or to any foreign country, any carcasses or parts thereof, meat, or meat food products thereof which have not been inspected, examined, and marked as "Inspected and Passed," in accordance with the terms of this Act and with the rules and regulations prescribed by the Secretary of Agriculture: *Provided*, That all meat and meat food products on hand on October 1, 1906, at establishments where inspection has not been maintained, or which have been inspected under existing law, shall be examined and labeled under such rules and regulations as the Secretary of Agriculture shall prescribe, and then shall be allowed to be sold in interstate or foreign commerce. [34 Stat. at Large 1262.]

[SEC. 9. *Counterfeiting Label.*] That no person, firm, or corporation, or officer, agent, or employee thereof, shall forge, counterfeit, simulate, or falsely represent, or shall without proper authority use, fail to use, or detach, or shall knowingly or wrongfully alter, deface, or destroy, or fail to deface or destroy, any of the marks, stamps, tags, labels, or other identification devices provided for in this Act, or in and as directed by the rules and regulations prescribed hereunder by the Secretary of Agriculture, on any carcasses, parts of carcasses, or the food product, or containers thereof, subject to the provisions of this Act, or any certificate in relation thereto, authorized or required by this Act or by the said rules and regulations of the Secretary of Agriculture. [34 Stat. at Large 1263.]

[SEC. 10. *Inspecting Animals.*] That the Secretary of Agriculture shall cause to be made a careful inspection of all cattle, sheep, swine, and goats intended and offered for export to foreign countries at such times and places, and in such manner as he may deem proper, to ascertain whether such cattle, sheep, swine, and goats are free from disease. [34 Stat. at Large 1264.]

[SEC. 11. *Inspectors.*] And for this purpose he may appoint inspectors who shall be authorized to give an official certificate clearly stating the condition in which such cattle, sheep, swine, and goats are found. [34 Stat. at Large 1263.]

[SEC. 12. *Clearance for Vessels.*] And no clearance shall be given to any vessel having on board cattle, sheep, swine, or goats for export to a foreign country until the owner or shipper of such cattle, sheep,

swine, or goats has a certificate from the inspector herein authorized to be appointed, stating that the said cattle, sheep, swine, or goats are sound and healthy, or unless the Secretary of Agriculture shall have waived the requirement of such certificate for export to the particular country to which such cattle, sheep, swine, or goats are to be exported. [34 Stat. at Large 1263.]

[SEC. 13. *Inspecting Carcasses.*] That the Secretary of Agriculture shall also cause to be made a careful inspection of the carcasses and parts thereof of all cattle, sheep, swine, and goats, the meat of which, fresh, salted, canned, corned, packed, cured, or otherwise prepared, is intended and offered for export to any foreign country at such times and places and in such manner as he may deem proper. [34 Stat. at Large 1263.]

[SEC. 14. *Inspectors.*] And for this purpose he may appoint inspectors who shall be authorized to give an official certificate stating the condition in which said cattle, sheep, swine, or goats, and the meat thereof, are found. [34 Stat. at Large 1263.]

[SEC. 15. *Clearance for Vessels.*] And no clearance shall be given to any vessel having on board any fresh, salted, canned, corned, or packed beef, mutton, pork, or goat meat, being the meat of animals killed after the passage of this Act, or except as hereinbefore provided for export to and sale in a foreign country from any port in the United States, until the owner or shipper thereof shall obtain from an inspector appointed under the provisions of this Act a certificate that the said cattle, sheep, swine, and goats were sound and healthy at the time of inspection, and that their meat is sound and wholesome, unless the Secretary of Agriculture shall have waived the requirements of such certificate for the country to which said cattle, sheep, swine, and goats or meats are to be exported. [34 Stat. at Large 1263.]

[SEC. 16. *Inspectors' Powers.*] That the inspectors provided for herein shall be authorized to give official certificates of the sound and wholesome condition of the cattle, sheep, swine, and goats, their carcasses and products as herein described, and one copy of every certificate granted under the provisions of this Act shall be filed in the Department of Agriculture, another copy shall be delivered to the owner or shipper, and when the cattle, sheep, swine, and goats or their carcasses and products are sent abroad, a third copy shall be delivered to the chief officer of the vessel on which the shipment shall be made. [34 Stat. at Large 1263.]

[SEC. 17. *Sale of Meat without Compliance with Law.*] That no person, firm or corporation engaged in the interstate commerce of meat or meat food products shall transport or offer for transportation, sell or offer to sell any such meat or meat food products in any State or Territory or in the District of Columbia or any place under the jurisdiction of the United States, other than in the State or Territory or in the District of Columbia or any place under the jurisdiction of the United States in which the slaughtering, packing, canning, rendering, or other similar establishment owned, leased, operated by said firm, person, or corporation

is located unless and until said person, firm, or corporation shall have complied with all of the provisions of this Act. [34 Stat. at Large 1264.]

[SEC. 18. *Penalties.*] That any person, firm or corporation, or any officer or agent of any such person, firm, or corporation, who shall violate any of the provisions of this Act shall be deemed guilty of a misdemeanor, and shall be punished on conviction thereof by a fine of not exceeding ten thousand dollars or imprisonment for a period not more than two years or by both such fine and imprisonment, in the discretion of the court. [34 Stat. at Large 1264.]

[SEC. 19. *Inspectors—Appointment—Duties.*] That the Secretary of Agriculture shall appoint from time to time inspectors to make examination and inspection of all cattle, sheep, swine, and goats, the inspection of which is hereby provided for, and of all carcasses and parts thereof, and of all meats and meat food products thereof, and of the sanitary conditions of all establishments in which such meat and meat food products hereinbefore described are prepared; and said inspectors shall refuse to stamp, mark, tag, or label any carcass or any part thereof, or meat food product therefrom, prepared in any establishment hereinbefore mentioned, until the same shall have actually been inspected and found to be sound, healthful, wholesome, and fit for human food, and to contain no dyes, chemicals, preservatives, or ingredients which render such meat food product unsound, unhealthful, unwholesome, or unfit for human food; and to have been prepared under proper sanitary conditions, hereinbefore provided for; and shall perform such other duties as are provided by this Act and by the rules and regulations to be prescribed by said Secretary of Agriculture shall, from time to time, make such rules and regulations as are necessary for the efficient execution of the provisions of this Act, and all inspections and examinations made under this Act shall be such and made in such manner as described in the rules and regulations prescribed by said Secretary of Agriculture not inconsistent with the provisions of this Act. [34 Stat. at Large 1264.]

[SEC. 20. *Bribery.*] That any person, firm, or corporation, or any agent or employee of any person, firm, or corporation, who shall give, pay, or offer, directly or indirectly, to any inspector, deputy inspector, chief inspector, or any other officer or employee of the United States authorized to perform any of the duties prescribed by this Act or by the rules and regulations of the Secretary of Agriculture any money or other thing of value, with intent to influence said inspector, deputy inspector, chief inspector, or other officer or employee of the United States in the discharge of any duty herein provided for, shall be deemed guilty of a felony and, upon conviction thereof, shall be punished by a fine not less than five thousand dollars nor more than ten thousand dollars and by imprisonment not less than one year nor more than three years; and any inspector, deputy inspector, chief inspector, or other officer or employee of the United States authorized to perform any of the duties prescribed by this Act who shall accept any money, gift, or other thing

of value from any person, firm, or corporation, or officers, agents, or employees thereof, given with intent to influence his official action, or who shall receive or accept from any person, firm, or corporation engaged in interstate or foreign commerce any gift, money, or other thing of value given with any purpose or intent whatsoever, shall be deemed guilty of a felony and shall, upon conviction thereof, be summarily discharged from office and shall be punished by a fine not less than one thousand dollars nor more than ten thousand dollars and by imprisonment not less than one year nor more than three years. [34Stat. at Large 1264.]

[SEC. 21. *Animals Slaughtered on Farms—Retail Butchers.*] That the provisions of this Act requiring inspection to be made by the Secretary of Agriculture shall not apply to animals slaughtered by any farmer on the farm and sold and transported as interstate or foreign commerce, nor to retail butchers and retail dealers in meat and meat food products, supplying their customers: *Provided*, That if any person shall sell or offer for sale or transportation for interstate or foreign commerce any meat or meat food products which are diseased, unsound, unhealthful, unwholesome, or otherwise unfit for human food, knowing that such meat food products are intended for human consumption, he shall be guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding one thousand dollars or by imprisonment for a period of not exceeding one year, or by both such fine and imprisonment: *Provided*, *also*, That the Secretary of Agriculture is authorized to maintain the inspection in this Act provided for at any slaughtering, meat-canning, salting, packing, rendering, or similar establishment notwithstanding this exception, and that the persons operating the same may be retail butchers and retail dealers or farmers; and where the Secretary of Agriculture shall establish such inspection then the provisions of this Act shall apply, notwithstanding this exception. [34 Stat. at Large 1265.]

[SEC. 22. *Submit Statement.*] And the Secretary of Agriculture shall, in his annual estimates made to Congress, submit a statement in detail, showing the number of persons employed in such inspections and the salary or per diem paid to each, together with the contingent expenses of such inspectors and where they have been and are employed. [34 Stat. at Large 1265.]

[The above statute appeared word for word in the Appropriation Act of June 30, 1906, 34 Stat. at Large 674, except an appropriation of \$3,000,000 for the inspectors' expenses was made.]

[B. A. I. Order 150.]

REGULATIONS GOVERNING THE MEAT INSPECTION OF THE UNITED STATES DEPARTMENT OF AGRICULTURE.

[This is the Government's Official Pamphlet.]

Regulation 1. Scope of Inspection.**WHAT MUST BE INSPECTED.—WHAT MAY BE EXEMPTED.**

SECTION 1. All slaughtering, packing, meat canning, salting, rendering, or similar establishments, except as hereinafter provided, the meat or meat food products of which, in whole or in part, enter into interstate or foreign commerce, shall have inspection under these regulations. The Secretary of Agriculture may exempt from inspection establishments operated by farmers, retail butchers, or retail dealers supplying their customers, but in the absence of such exemption inspection is required.

BRANCH HOUSES.

SEC. 2. Branch houses of official establishments, when such branch houses are engaged in interstate or foreign commerce and slaughter animals or process meat, shall be considered a part of the parent house, and products received into such branch houses or sent from them shall be subject to these regulations, and inspection shall be maintained therein.

Regulation 2. Organization of Force.**CIVIL SERVICE CERTIFICATION.**

SECTION 1. Paragraph 1. All permanent employees of the Department of Agriculture engaged in the work of meat inspection are appointed upon certification of the Civil Service Commission that they have passed the examination prescribed by that Commission. Promotions in all classes are made on the basis of efficiency, deportment, and length of service. Such employees include:

INSPECTORS IN CHARGE.

Paragraph 2. *Inspectors in charge.*—These are inspectors assigned by the Bureau of Animal Industry to supervise official work at each official station. Such employees report directly to the Chief of the Bureau of Animal Industry and are chosen by reason of their fitness for responsibility as determined by their records in the service. At stations where slaughtering is conducted, only veterinary inspectors are placed in charge.

VETERINARY INSPECTORS.

Paragraph 3. *Veterinary inspectors.*—All applicants examined for

these positions must be graduates of recognized veterinary colleges having a course of not less than three years leading to the degree. All final ante-mortem and post-mortem examinations are conducted by veterinarians. At some stations the veterinarians are assisted in making preliminary examinations by trained laymen known as inspectors' assistants.

TRAVELING VETERINARY INSPECTORS.

Paragraph 4. *Traveling veterinary inspectors.*—To observe the conditions of sanitation of the establishments at the various stations, note the processes of ante-mortem and post-mortem inspection, confer with and instruct inspectors regarding it, with a view to a uniform system throughout the country, and to report these matters to the Washington office, constitute the principal duties of these employees.

LABORATORY INSPECTORS.

Paragraph 5. *Laboratory inspectors.*—These employees possess technical training in microscopical and chemical examination of meat food products, and their inspections are conducted in laboratories located at various slaughtering centers. Pathological laboratories are also maintained, to which diseased specimens may be sent when necessary for diagnosis.

MEAT INSPECTORS.

Paragraph 6. *Meat inspectors.*—These employees are laymen, experienced in the curing, canning, packing, or otherwise preparing the meat; they supervise that work and the use of permitted preservatives described in Regulation 22.

TRAVELING MEAT INSPECTORS.

Paragraph 7. *Traveling meat inspectors.*—These employees perform a service similar to that required of traveling veterinary inspectors, but along the line of the preparation and handling of meat products.

INSPECTORS' ASSISTANTS.

Paragraph 8. *Inspectors' assistants.*—These employees are laymen, who are first assigned to routine duties and are promoted through examination to higher duties, such as assisting in conducting ante-mortem and post-mortem examinations.

PATROLMEN.

Paragraph 9. *Patrolmen.*—Patrolmen are employed to patrol the establishments at night, to oversee the receipts and shipments of meat,

and to observe any operations conducted at night. They consist of veterinarians, inspectors' assistants, or meat inspectors, according to the character of the work where assigned.

SKILLED LABORERS.

Paragraph 10. *Skilled laborers.*—These employees supervise the marking of meat and meat containers, and perform similar work. They are eligible for promotion only through examination.

Regulation 3. Interpretation and Definition of Words and Terms.

DEFINITIONS.

Wherever in these regulations the following words, names, or terms are used they shall be construed as follows:

OFFICIAL ESTABLISHMENT.

SECTION 1. *Official establishment.*—This term shall mean any slaughtering, meat-canning, salting, rendering, or similar establishment at which inspection is maintained under the meat-inspection law approved June 30, 1906 (34 Stat., 674).

INSPECTORS AND DEPARTMENT EMPLOYEES.

SEC. 2. *Inspectors and Department employees.*—These terms shall mean, respectively, inspectors and employees of the Bureau of Animal Industry.

"INSPECTED AND PASSED."

SEC. 3. *"Inspected and Passed."*—This phrase, or any authorized abbreviation thereof, shall mean that the carcasses, parts of carcasses, meat, and meat food products so marked have been inspected and passed for food under these regulations.

RENDERED INTO LARD OR TALLOW.

SEC. 4. *Rendered into lard or tallow.*—This phrase shall mean that the carcasses, parts of carcasses, meat, and meat food products so designated are allowed to be made into edible lard or edible tallow.

INSPECTED AND CONDEMNED.

SEC. 5. *"U. S. Inspected and Condemned."*—This phrase shall mean that the carcasses, parts of carcasses, meat, and meat food products so marked are unfit for food and shall be destroyed for food purposes.

CARCASS.

SEC. 6. *Carcass*.—This word shall apply to the carcass of an animal that has been killed under these regulations and shall include all parts which are to be used for food.

PRIMAL PARTS.

SEC. 7. *Primal parts of carcasses*.—This phrase shall mean the usual sections or cuts of the dressed carcass commonly known in the trade, such as sides, quarters, shoulders, hams, backs, bellies, etc., and beef tongues, beef livers, and beef tails, before they have been cut, shredded, or otherwise subdivided preliminary to use in the manufacture of meat food products.

MEAT FOOD PRODUCTS.

SEC. 8. *Meat food products*.—Paragraph 1. A meat food product, within the meaning of the meat-inspection act and of these regulations, is considered to be any article of food intended for human use which is derived or prepared in whole or in part from any edible portion of the carcass of cattle, sheep, swine, or goats, if the said edible portion so used is a considerable and definite portion of the finished food.

MIXTURES, ETC.

Paragraph 2. *Mixture*.—A mixture of which meat is an ingredient will not be considered a meat food product unless the meat contained therein is a definite and considerable portion of the said mixture. But where such mixture is prepared in a part of an official establishment, the sanitation of that part of the establishment will be supervised by the Department, and the meat or meat food product will be inspected before it enters the said mixture. The mixture shall not bear the meat-inspection legend or any simulation thereof. If any reference is made to Federal inspection it shall be in the following form: "The meat contained herein has been inspected and passed at an establishment where Federal inspection is maintained." Mixtures such as mince-meat, soups, etc., which come under this description and which are not officially labeled, are allowed in interstate and foreign commerce without further inspection, and without certificates, subject to the provisions and requirements of the Food and Drugs Act of June 30, 1906, and the regulations made thereunder.

MEDICAL MEAT PRODUCTS.

SEC. 9. *Medical meat products*.—Products such as meat juice, meat extract, etc., which are intended only for medicinal purposes and are advertised only to the medical profession, are not considered meat food products within the meaning of this order.

VINEGAR.

SEC. 10. *Vinegar*.—The word vinegar, as used herein, shall mean cider vinegar, wine vinegar, malt vinegar, sugar vinegar, glucose vinegar, or spirit vinegar.

Regulation 4. Inspection or Exemption.

APPLICATION FOR INSPECTION OR EXEMPTION.

SECTION 1. The proprietor or operator of each slaughtering, packing, meat-canning, rendering, or similar establishment engaged in the slaughtering of cattle, sheep, swine, or goats, or in the packing, canning, or other preparation of any meat food product for interstate or foreign commerce, shall make application to the Secretary of Agriculture for inspection or for exemption from inspection, except in cases where inspection or exemption is already in effect. In case of change of ownership or change of location of an establishment already having inspection, a new application shall be made. Exemption under the law can be given only to establishments operated by retail butchers and retail dealers. Such application shall be in writing addressed to the Secretary of Agriculture, Washington, D. C., shall state the location of the establishment, and shall be made on blanks which will be furnished by the chief of the Bureau of Animal Industry upon request.

CONDITIONS.

SEC. 2. Inspection shall not be begun if an establishment is not in a sanitary condition, nor unless the establishment provides and guarantees to maintain adequate facilities for conducting such inspection.

EXEMPTION.

SEC. 3. If in the judgment of the Secretary of Agriculture the retail butcher or retail dealer who is operating an establishment and engaged in supplying his customers through the medium of interstate or foreign commerce is entitled to exemption from Federal inspection, a numbered certificate of exemption will be furnished to the applicant for use with transportation companies and other companies and persons in securing the movement of his products. If an establishment, including both market and slaughterhouse of such retail butcher or dealer, is not in a sanitary condition a certificate of exemption will not be issued.

EXEMPTED ESTABLISHMENTS TO CONFORM TO REGULATIONS.

SEC. 4. Exempted establishments shall be open to the inspectors of the Bureau of Animal Industry, shall be maintained in a clean condition, and shall conform to the same regulations as govern official establish-

ments in regard to labeling, dyes, chemicals, and preservatives, and unsound, unwholesome and unfit meat.

Regulation 5. Official Number.

OFFICIAL NUMBER.

SECTION 1. Paragraph 1. When inspection is established the Secretary of Agriculture will give the establishment a number, and this number shall be used to mark the meat and meat food products of the establishment as hereafter prescribed.

MORE THAN ONE ESTABLISHMENT UNDER SAME OWNERSHIP.

Paragraph 2. Two or more official establishments under the same ownership or control may use the same establishment number, provided a serial letter is added in each case to designate the establishment and to enable its product to be identified.

SUBSIDIARY COMPANIES.

Paragraph 3. Persons, firms, or corporations owning subsidiary companies having legal entity may use the names of such companies, provided application has been made for inspection and it has been granted, the inspection legend in such case to bear the official establishment number of the parent firm or corporation.

SEPARATION OF INSPECTED FROM UNINSPECTED ESTABLISHMENTS.

Paragraph 4. Each official establishment must be separate and distinct from any other establishment or department in which animal products are handled at which inspection is not maintained. When two or more companies prepare their products in the same official establishment they must obtain inspection under the same number. The name of the distributor may appear upon the label.

Regulation 6. Assignment of Inspectors, etc.

ASSIGNMENT OF INSPECTORS, ETC.

SECTION 1. The Chief of the Bureau of Animal Industry will designate an inspector to take charge of the inspection at each official establishment, and will assign to said inspector such assistants as may be necessary.

ACCESS TO ESTABLISHMENT.

SEC. 2. For the purpose of enforcing the law and regulations all employees of the Bureau of Animal Industry shall have access at all

times, by day or night, whether the establishment be operated or not, to every part of the establishment.

BADGES.

SEC. 3. Each employee of the Bureau of Animal Industry working under these regulations will be furnished with a numbered badge, which he shall wear over the left breast on the outer clothing while in the performance of his official duties, and which shall not be allowed to leave his possession. This official badge, shall be sufficient identification to entitle him to admittance at all regular entrances and to all parts of the establishment and premises.

OFFICE ROOM.

SEC. 4. Office room, including light and heat, shall be provided by proprietors of establishments, rent free, for the exclusive use, for official purposes, of the inspector and other employees of the Department assigned thereto. The room or rooms set apart for this purpose must be properly ventilated, conveniently located, and provided with lockers suitable for the protection and storage of such supplies as may be required; all to meet the approval of the inspector in charge.

Regulation 7. All Carcasses and Products Inspected.

NO EXCEPTION TO INSPECTION IN OFFICIAL ESTABLISHMENTS.

SECTION 1. All cattle, sheep, swine, or goats slaughtered at an official establishment, and all meat and meat food products prepared therein, shall be inspected, handled, prepared, and marked as required by these regulations.

Regulation 8. Notice of Daily Operations, etc.

NOTICE OF OPERATION.—REASONABLE HOURS AND SPEED.

SECTION 1. The manager of each official establishment shall inform the inspector in charge, or his assistant, when work has been concluded for the day, and of the day and hour when work will be resumed. Under no circumstances shall any department of an establishment be operated except under the supervision of an employee of the Bureau of Animal Industry. All slaughtering of animals and the preparation of meat and meat food products shall be done within reasonable hours, and with reasonable speed, the facilities of the establishment being considered.

INSPECTOR MAY DESIGNATE HOURS.

SEC. 2. Where one inspector is detailed to conduct the work at two or more small establishments where few animals are slaughtered or

where but a small quantity of meat or meat food products is prepared, the inspector in charge may designate the hours for work.

NO WORK ON DAYS PROHIBITED BY LAW.

SEC 3. No work shall be performed at official establishments during any day on which such work is prohibited by the law of the State or Territory in which the establishment is located. However, the Department will require that it be judicially determined that such work is prohibited by the State law.

Regulation 9. Bribery.

BRIBERY, ETC.

SECTION 1. It is a felony, punishable by fine and imprisonment, for any person, firm, or corporation to give, pay, or offer, directly or indirectly, to any Department employee authorized to perform any duty under these regulations any money or other thing of value with intent to influence said employee in the discharge of his duty under these regulations. It is also a felony, punishable by fine and imprisonment, for any Department employee engaged in the performance of duty under these regulations to receive or accept from any person, firm, or corporation engaged in interstate or foreign commerce any gift, money, or other thing of value given with any purpose or intent whatsoever.

Regulation 10. Sanitation.

PRELIMINARY EXAMINATION OF ESTABLISHMENTS.

SECTION 1. After the receipt of an application for inspection or exemption an examination of the establishment and premises will be made and the requirements for sanitation and the necessary facilities for inspection will be specified.

PLANS AND SPECIFICATIONS OF PLANTS.

SEC. 2. Plans and specifications, in duplicate, of plants for which application for inspection is made, also of new plants and plants to be remodeled, should be submitted to the Secretary of Agriculture.

LIGHT, VENTILATION, DRAINAGE, ETC.

SEC. 3. Official establishments and establishments to which certificates of exemption have been issued shall be suitably lighted and ventilated and maintained in a sanitary condition, and shall be provided with efficient drainage, having properly trapped or other approved sewer con-

nections. Rooms in which inspection is carried on shall, by heating or other means, be kept reasonably free from steam and other vapors, in order that proper inspection can be made. All work in such establishments shall be performed in a cleanly and sanitary manner.

CEILINGS, WALLS, FLOORS, APPROACHES, ETC.

SEC. 4. Ceilings, walls, pillars, partitions, etc., shall be kept in a sanitary condition, and when necessary they shall be washed, scraped, painted or otherwise treated as required. Where floors or other parts of a building, or tables or other parts of the equipment, are so old or in such poor condition that they can not be readily made sanitary they shall be removed and replaced by suitable materials. All floors upon which meats are piled during the process of curing shall be so constructed that they can be kept in a clean and sanitary condition, and all meat piled upon floors shall be suitably protected from trucks, etc. Walks and platforms or approaches leading into establishments shall be kept clean to prevent tracking dirt into the same.

RECEPTACLES, UTENSILS, MACHINERY, VEHICLES, ETC.

SEC. 5. All trucks, trays, and other receptacles, all chutes, platforms, racks, tables, etc., and all knives, saws, cleavers, and other tools, and all utensils, machinery, and vehicles used in moving, handling, cutting, chopping, mixing, canning, or other processes shall be thoroughly cleaned before using.

EMPLOYEES AND THEIR CLOTHING.

SEC. 6. Managers of establishments must require employees to be cleanly. The aprons, smocks, or other outer clothing worn by employees who handle meat or meat food products shall be of a material that is readily cleansed and made sanitary, and only clean garments shall be worn. Persons who handle meat or meat food products shall be required to keep their hands clean, and they shall be required also to pay particular attention to the cleanliness of their boots or shoes.

DISEASED EMPLOYEES.

SEC. 7. Persons affected with tuberculosis or any other communicable disease shall not be employed in any of the departments of establishments where carcasses are dressed, meat is handled, or meat food products are prepared; and any employee of such establishment who may be suspected of being so affected shall be reported by the inspector in charge to the manager of the establishment and to the Chief of the Bureau of Animal Industry.

WATER-CLOSETS, TOILETS, AND DRESSING ROOMS.

SEC. 8. All water-closets, toilet rooms, and dressing rooms shall be entirely separated from compartments in which carcasses are dressed or meat or meat food products are cured, stored, packed, handled, or prepared. Where such rooms open into compartments in which meat or meat food products are handled they must, when this is considered necessary, be provided with properly ventilated vestibules and with automatically closing doors. They shall be conveniently located, sufficient in number, ample in size, and fitted with modern lavatory accommodations, including toilet paper, soap, running hot and cold water, towels, etc. They shall be properly lighted, suitably ventilated, and kept in a sanitary condition. Convenient and sanitary urinals shall be provided; and washstands, near at hand, shall also be provided.

OBJECTIONABLE ODORS, SCREENING, CUSPIDORS.

SEC. 9. The rooms or compartments in which meat or meat food products are prepared, cured, stored, packed, or otherwise handled shall be free from odors from toilet rooms, catch basins, casing departments, tank rooms, hide cellars, etc. and shall be kept free from flies and other vermin by screening or other methods. All rooms or compartments shall be provided with cuspidors of such shape as not readily to be upset and of such material and construction as to be readily disinfected, and employees who expectorate shall be required to use them.

NUISANCES ON PREMISES.

SEC. 10. The feeding of hogs or other animals on the refuse of slaughterhouses shall not be permitted on the premises of an exempted establishment or an official establishment, and no use incompatible with proper sanitation shall be made of any part of the premises on which such establishment is located. All yards, fences, pens, chutes, alleys, etc., belonging to the premises of such establishments, whether they are used or not, shall be maintained in a sanitary condition, and no nuisance shall be allowed in the establishment or on its premises.

DISINFECTION AFTER HANDLING DISEASED CARCASSES.

SEC. 11. Butchers who dress or handle diseased carcasses or parts shall cleanse their hands of all grease and then immerse them in a prescribed disinfectant and rinse them in clear water before dressing or handling healthy carcasses. All butchers' implements used in dressing diseased carcasses shall be sterilized either in boiling water or by immersion in a prescribed disinfectant, followed by rinsing in clear water. Facilities for such cleansing and disinfection, approved by the inspector in charge, shall be provided by the establishment. Separate sanitary trucks,

etc., which shall be appropriately and distinctively marked, shall be furnished for handling diseased carcasses and parts. Following the slaughter of any animal affected with an infectious disease, a stop shall be made until the implements have been cleansed and disinfected, unless other clean implements are provided.

IMPLEMENTS USED BY INSPECTORS.

SEC. 12. Inspectors are required to furnish their own implements or use in dissecting, incising, or examining diseased carcasses or unsound parts, and are required to use the same means for disinfecting implements, hands, etc., that are prescribed for employees of the establishment.

SOILED MEAT.

SEC. 13. Due care must be taken to prevent meat and meat food products from falling on the floor; and in the event of their having so fallen, they must be condemned or the soiled portions removed and condemned. When meat or meat food products are being emptied into tanks, some device, such as a metal funnel, must be used.

INFLATION WITH AIR, ETC.

SEC. 14. Carcasses shall not be inflated with air from the mouth, and no inflation of carcasses except by mechanical means shall be allowed. Carcasses shall not be dressed with skewers, knives, etc., that have been held in the mouth. Skewers shall be cleaned before being used again. Spitting on whetstones or steels when sharpening knives shall not be allowed.

WATER AND ICE.

SEC. 15. Only good, clean, and wholesome water and ice shall be used in the preparation of carcasses, parts, meat, or meat food products. Whenever there is any doubt regarding the sanitary condition of the water supply, notice shall be sent immediately to the Chief of the Bureau of Animal Industry.

WAGONS AND CARS.

SEC. 16. Wagons or cars in which meat or meat food products are transported shall be kept in a clean and sanitary condition. The wagons used in transporting loose meat between official establishments shall be so closed and covered that the contents shall be kept clean, and so constructed that the may, when necessary, be locked and sealed with Government seals, which seals shall be affixed and broken only by employees of the Department.

SKINS AND HIDES.

SEC. 17. Skins and hides from animals condemned for tuberculosis or any other disease infectious to man, but showing no outward appearance of disease, may be removed (except as provided in Regulation 13, Section 2) for tanning or other uses in the arts when disinfected as follows: Each skin and hide must be immersed for not less than five minutes in a five percent solution of liquor cresolis compositus, or a five percent solution of carbolic acid, or a one to one thousand solution of bichlorid of mercury. The process of skinning and dipping must be conducted entirely in the retaining room, or other specially prepared place, approved by the inspector in charge, for final inspection.

Regulation 11. Ante-mortem Examination and Inspection.**ANTE-MORTEM INSPECTION; WHEN MADE, ETC.**

SECTION 1. An ante-mortem examination and inspection shall be made of all cattle, sheep, swine, and goats about to be slaughtered before they shall be allowed to be killed in an official establishment. Satisfactory facilities for conducting said inspection and for separating and holding apart from passed animals those marked "U. S. Suspect" shall be provided.

SUSPECTED ANIMALS.

SEC. 2. All animals showing symptoms or suspected of being affected with any disease or condition which, under these regulations, would probably cause their condemnation in whole or in part when slaughtered shall be marked by affixing to the animal a metal tag bearing the words "U. S. Suspect." All such animals, except as hereinafter provided, shall be set apart and slaughtered separately from other animals at an official establishment.

PREGNANT, PARTURIENT, AND VACCINE ANIMALS.

SEC. 3. Animals which have been tagged for pregnancy or for having recently given birth to young, and which have not been exposed to any infectious or contagious disease, and vaccine animals with unhealed lesions accompanied by fever and which have not been exposed to any other infectious or contagious disease, are not required to be slaughtered, but before any such animal is removed the tag shall be detached by a Department employee and returned with his report to the inspector in charge.

QUESTION OF TEMPERATURE.

SEC. 4. If any pathological condition is suspected in which the question of temperature is important, such as Texas fever, anthrax, pneumonia, blackleg, or septicemia, the exact temperature should be taken. Due con-

sideration, however, must be given to the fact that extremely high temperature may be found in otherwise normal hogs when subjected to exercise or excitement, and a similar condition may obtain to a less degree among other classes of animals.

DOWNERS AND CRIPPLES.

SEC. 5. Animals commonly termed "downers," or crippled animals, shall be tagged before slaughter as provided for in Regulation 17, Section 1, for the purpose of identification at the time of slaughter, and shall be passed upon in accordance with these regulations.

Regulation 12. Post-mortem Inspection at Time of Slaughter.

PARTS RETAINED, ETC.

SEC. 1. A careful inspection shall be made of all animals at the time of slaughter. The head, tongue, tail, thymus gland, and all viscera, and all parts and blood used in the preparation of meat food or medical products, shall be retained in such manner as to preserve their identity until after post-mortem examination has been completed, in order that they may be identified in case of condemnation of the carcass. Suitable racks or metal receptacles shall be provided for retaining such parts.

SOUND CARCASSES.

SEC. 2. Carcasses and parts thereof found to be sound, healthful, wholesome, and fit for human food shall be passed and marked as provided in these regulations.

UNSOUND CARCASSES.

SEC. 3. Should any lesion of disease or other condition that would render the meat or any organ unfit for food purposes be found on post-mortem examination, the carcass, part or organ shall be marked immediately with a tag, as provided in Regulation 17, Section 3. Carcasses which have been so marked shall not be washed or trimmed unless such washing or trimming is authorized by the inspector.

Regulation 13. Disposal of Diseased Carcasses and Organs.

GENERAL STATEMENT.

SECTION 1. The carcasses or parts of carcasses of all animals slaughtered at an official establishment and found at time of slaughter or at any subsequent inspection to be affected with any of the diseases or conditions named below shall be disposed of according to the section of this regulation pertaining to the disease or condition. It is to be understood,

however, that owing to the fact that it is impracticable to formulate rules covering every case, and to designate at just what stage a process becomes loathsome or a disease noxious, the decision as to the disposal of all carcasses, parts, or organs not specifically covered by these regulations shall be left to the veterinary inspector in charge.

ANTHRAX OR CHARBON.

SEC. 2. All carcasses showing lesions of anthrax or charbon, regardless of the extent of the disease, and including the hide, hoofs, horns, viscera, fat, blood, and all other portions of the animal, shall be condemned and immediately incinerated. The killing bed upon which the animal was slaughtered shall be disinfected with a ten percent solution of formalin, and all knives, saws, cleavers, and other instruments which have come in contact with the carcass shall be treated as provided in Regulation 10, section 11, before being used upon another carcass.

BLACKLEG.

SEC. 3. Carcasses of animals showing lesions of blackleg shall be condemned.

HEMORRHAGIC SEPTICEMIA.

SEC. 4. Carcasses of animals affected with hemorrhagic septicemia shall be condemned.

PYEMIA AND SEPTICEMIA.

SEC. 5. Carcasses showing lesions of pyemia or septicemia shall be condemned.

VACCINA.

SEC. 6. Carcasses of vaccine animals mentioned under Regulation 11, Section 3, shall be condemned.

RABIES.

SEC. 7. Carcasses of animals which showed symptoms of rabies before slaughter shall be condemned.

TETANUS.

SEC. 8. Carcasses of animals which showed symptoms of tetanus before slaughter shall be condemned.

MALIGNANT EPIZOOTIC CATARRH.

SEC. 9. Carcasses of animals affected with malignant epizootic ca-

tarrh and showing generalized inflammation of the mucous membranes shall be condemned.

HOG CHOLERA AND SWINE PLAGUE.

SEC. 10. Paragraph 1. Carcasses showing well-marked and progressive lesions of hog cholera or swine plague in more than two of the organs (skin, kidneys, bones, or lymphatic glands) shall be condemned.

Paragraph 2. Provided they are well nourished, carcasses showing slight and limited lesions of these diseases may be passed.

Paragraph 3. Carcasses which reveal lesions more numerous or advanced than those for carcasses to be passed, but not so severe as the lesions described for carcasses to be condemned, may be rendered into lard, provided they are cooked by steam for four hours at a temperature not lower than 220 degrees Fahrenheit, or at a pressure of four pounds.

Paragraph 4. In inspecting carcasses showing lesions of hog cholera or swine plague in the skin bones, kidneys, or lymphatic glands, due consideration shall be given to the extent and severity of the lesions found in the viscera.

ACTINOMYCOSIS OR LUMPY JAW.

SEC. 11. Paragraph 1. If a carcass affected with actinomycosis or lumpy jaw is in a well nourished condition and there is no evidence upon post-mortem examination that the disease has extended from a primary area of infection in the head, the carcass may be passed, but the head including the tongue shall be condemned.

Paragraph 2. Carcasses of animals showing uncomplicated localized actinomycotic lesions other than, or in addition to, those specified in paragraph 1 of this section may be passed after the infected organs and parts have been removed and condemned.

Paragraph 3. Carcasses of animals showing a generalized actinomycosis shall be condemned.

CASEOUS LYMPHADENITIS.

SEC. 12. When the lesions of caseous lymphadenitis are limited to the superficial lymphatic glands or to a few nodules in an organ, involving also the adjacent lymphatic glands, and the carcass is well nourished, the meat may be passed after the affected parts are removed and condemned. If extensive lesions, with or without pleuritic adhesions, are found in the lungs, or if several of the visceral organs contain caseous nodules and the carcass is emaciated, it shall be condemned.

TUBERCULOSIS.

SEC. 13. Paragraph 1. The following principles are declared for guidance in passing on carcasses affected with tuberculosis:

FUNDAMENTAL THOUGHT.

Principle A.—The fundamental thought is that meat should not be used for food if it contains tubercle bacilli, if there is a reasonable possibility that it may contain tubercle bacilli, or if it is impregnated with toxic substances of tuberculosis or associated septic infections.

LESIONS LOCALIZED AND NOT NUMEROUS.

Principle B.—On the other hand, if the lesions are localized and not numerous, if there is no evidence of distribution of tubercle bacilli through the blood, or by other means, to the muscles or to parts that may be eaten with the muscles, and if the animal is well nourished and in good condition, there is no proof, or even reason to suspect, that the flesh is unwholesome.

GENERALIZED TUBERCULOSIS.

Principle C.—Evidences of generalized tuberculosis are to be sought in such distribution and number of tuberculous lesions as can be explained only upon the supposition of the entrance of tubercle bacilli in considerable number into the systemic circulation. Significant of such generalization are the presence of numerous uniformly distributed tubercles throughout both lungs, also tubercles in the spleen, kidneys, bones, joints, and sexual glands, and in the lymphatic glands connected with these organs and parts, or in the splenic, renal, prescapular politeal, and inguinal glands, when several of these organs and parts are coincidentally affected.

LOCALIZED TUBERCULOSIS.

Principle D.—By localized tuberculosis is understood tuberculosis limited to a single or several parts or organs of the body without evidence of recent invasion of numerous bacilli into the systemic circulation.

RULES FOR DISPOSAL OF TUBERCULOUS MEAT.—ENTIRE CARCASS CONDEMNED.

Paragraph 2. The following rules shall govern the disposal of tuberculous meat:

Rule A.—The entire carcass shall be condemned—

(a) When it was observed before the animal was killed that it was suffering with fever.

(b) When there is a tuberculous or other cachexia, as shown by anemia and emaciation.

(c) When the lesions of tuberculosis are generalized, as shown by their presence not only at the usual seats of primary infection, but also in parts of the carcass or the organs that may be reached by the bacilli of tuberculosis only when they are carried in the systemic circulation. Tuberculosis lesions in any two of the following-mentioned organs are to be accepted as evidence of generalization when they occur in addition

to local tuberculous lesions in the digestive or respiratory tracts, including the lymphatic glands connected therewith: spleen, kidney, uterus, udder, ovary, testicle, adrenal gland, brain, or spinal cord or their membranes. Numerous uniformly distributed tubercles throughout both lungs also afford evidence of generalization.

(d) When the lesions of tuberculosis are found in the muscles or intermuscular tissue or bones or joints or in the body lymphatic glands as a result of draining the muscles, bones, or joints.

(e) When the lesions are extensive in one or both body cavities.

(f) When the lesions are multiple, acute, and actively progressive. (Evidence of active progress consists in signs of acute inflammation about the lesions, or liquefaction necrosis, or the presence of young tubercles.)

PART OF CARCASS CONDEMNED.

Rule B.—An organ or a part of a carcass shall be condemned—

(a) When it contains lesions of tuberculosis.

(b) When the lesion is immediately adjacent to the flesh, as in the case of tuberculosis of the parietal pleura or peritoneum, not only the membrane or part affected but also the adjacent thoracic or abdominal wall is to be condemned.

(c) When it has been contaminated by tuberculous material, through contact with the floor, a soiled knife, or otherwise.

(d) All heads showing lesions of tuberculosis shall be condemned.

(e) An organ shall be condemned when the corresponding lymphatic gland is tuberculous.

CARCASS PASSED.

Rule C.—The carcass, if the tuberculous lesions are limited to a single or several parts or organs of the body (except as noted in Rule A), without evidence of recent invasion of tubercle bacilli into the systemic circulation, shall be passed after the parts containing the localized lesions are removed and condemned in accordance with Rule B.

CARCASS RENDERED INTO LARD OR TALLOW.

Rule D.—Carcasses which reveal lesions more numerous than those described for carcasses to be passed (Rule C.), but not so severe as the lesions described for carcasses to be condemned (Rule A.), may be rendered into lard or tallow if the distribution of the lesions is such that all parts containing tuberculous lesions can be removed. Such carcasses shall be cooked by steam at a temperature not lower than 220 degrees Fahrenheit for not less than four hours.

TEXAS FEVER.

SEC. 14. Carcasses showing lesions to warrant the diagnosis of Texas fever shall be condemned.

PARASITIC ICTERO-HEUMATURIA.

SEC. 15. Carcasses of sheep affected with parasitic ictero-heumaturia shall be condemned.

MANGE OR SCAB.

SEC. 16. Carcasses of animals affected with mange, or scab, in advanced stages, or showing emaciation or extension of the inflammation to the flesh, shall be condemned. When the disease is slight the carcass may be passed.

TAPEWORM CYSTS.

SEC. 17. Paragraph 1. Carcasses of animals affected with tapeworm cysts, known as *Cysticercus bovis* and *C. Celluloae*, shall be rendered into lard or tallow, unless the infestation is excessive, in which case the carcass shall be condemned.

Paragraph 2. Carcasses of animals found infested with gid bladder-worm (*Coenurus cerebralis*, *Multiceps socialis*) may be passed after condemnation of the infected organ (brain, spinal cord).

Paragraph 3. Carcasses or parts of carcasses found infested with the hydatid cyst (echinococcus) may be passed after condemnation of the infected part or organ.

INFECTIONS THAT MAY CAUSE MEAT POISONING.

SEC. 18. All carcasses of animals so infected that consumption of the meat or meat food products thereof may give rise to meat poisoning shall be condemned. This section covers all carcasses showing signs of—

- (a) Acute inflammation of the lungs, pleura, pericardium, peritoneum, or meninges.
- (b) Septicemia or pyemia, whether puerperal, traumatic, or without any evident cause.
- (c) Severe hemorrhagic or gangrenous enteritis or gastritis.
- (d) Acute diffuse metritis or mammitis.
- (e) Polyarthrititis.
- (f) Phlebitis of the umbilical veins.
- (g) Traumatic pericarditis.
- (h) Any other inflammation, abscess, or suppurating sore if associated with acute nephritis, fatty and degenerated liver, swollen soft spleen, marked pulmonary hyperemia, general swelling of lymphatic glands, and diffuse redness of the skin, either singly or in combination.

Immediately after slaughter of any animal so diseased the premises and implements used must be thoroughly disinfected as prescribed elsewhere in these regulations. The part of any carcass coming in contact with the carcass or any part of the carcass of any animal covered by this section, other than those affected with the diseases mentioned in (a) above, or with the place where such animal was slaughtered, or with

the implements used in the slaughter, before thorough disinfection of such place and implements has been accomplished, or with any other contaminated object, shall be condemned; in case the contaminated part is not removed from the carcass within two hours after such contact the whole carcass shall be condemned.

ICTERUS.

SEC. 19. Carcasses affected with icterus and showing an intense yellow or greenish yellow discoloration after proper cooling shall be condemned. Carcasses which exhibit a yellowish tinge directly after slaughter, but lose this discoloration on chilling, may be passed for food.

UREMIA AND SEXUAL ODOR.

SEC. 20. Carcasses which give off the odor of urine or a strong sexual odor shall be condemned.

URTICARIA, ETC.

SEC. 21. Hogs affected with urticaria (diamond skin disease) *Tinea tonsurans*, *Demodex folliculorum*, or erythema may be passed after detaching and condemning the skin, if the carcass is otherwise fit for food.

MELANOSIS, ETC.

SEC. 22. Carcasses of animals showing any disease, such as generalized melanosis, pseudo-leukemia, etc., which affects the system of the animal, shall be condemned.

TUMORS, BRUISES, ABSCESSSES, LIVER FLUKES, ETC.

SEC. 23. Any organ or part of a carcass which is badly bruised or which is affected by tumors, malignant or benign, abscesses, suppurating sores, or liver flukes shall be condemned; but when the lesions are so extensive as to affect the whole carcass, the whole carcass shall be condemned.

EMACIATION AND ANEMIA.

SEC. 24. Carcasses of animals too emaciated or anemic to produce wholesome meat, and carcasses which show a slimy degeneration of the fat or serious infiltration of the muscles, shall be condemned.

MILK FEVER AND RAILROAD SICKNESS.

SEC. 25. Carcasses of animals showing symptoms of milk fever or railroad sickness at the time of slaughter shall be condemned, as the flesh of such animals is frequently darker in color and more watery than

is natural, and the present view of the pathology of at least the first disease suggests autointoxication.

PREGNANCY AND PARTURITION.

SEC. 26. Carcasses of animals in advanced stages of pregnancy (showing signs of parturition), also carcasses of animals which have within ten days given birth to young and in which there is no evidence of septic infection, may be rendered into lard or tallow if desired by the manager of the establishment; otherwise they shall be condemned.

IMMATURITY.

SEC. 27. Carcasses of animals too immature to produce wholesome meat, all unborn and stillborn animals, also carcasses of calves, pigs, kids, and lambs under three weeks of age, shall be condemned.

DISEASED PARTS.

SEC. 28. In all cases where carcasses showing localized lesions of disease are passed or rendered into lard or tallow, the diseased parts must be removed before the "U. S. Retained" tag is taken from the carcass, and such parts shall be condemned.

SUFFOCATION.

SEC. 29. Hogs which have been allowed to pass into the scalding vat alive or have been suffocated in other ways shall be condemned.

DEAD ANIMALS.

SEC. 30. All animals that die in abattoir pens, and those in a dying condition before slaughter, shall be condemned and tagged as provided in Regulation 17, Section 2. In conveying to the tank animals which have died in the pens of the establishment, they shall not be allowed to pass through compartments in which food products are prepared. No dead animals shall be brought into an establishment for rendering from outside the premises of said establishment unless permission is first obtained from the Chief of the Bureau of Animal Industry.

BRUISED PARTS.

SEC. 31. When a portion of a carcass is to be condemned on account of slight bruises, the bruised portion shall be removed immediately and tanked, and the remainder of the carcass shall be marked "Inspected and Passed." When desired, a retaining room may be provided in one part of the cooler for the retention of such carcasses until after they are chilled, when the bruised portion may be removed.

PORTIONS OF INTESTINES.

SEC. 32. Portions of intestines that show evidences of infestation with esophagostoma or other nodular affections shall be condemned.

EVisCERATION OF DISEASED HOGS.

SEC. 33. Hog carcasses found before evisceration has taken place to be affected with an infectious or contagious disease, including tuberculosis, shall not be eviscerated at the regular killing bed or bench, but shall be taken, separate from other carcasses, to the retaining room or other specially prepared place and there opened and examined.

Regulation 14. "Retaining" Rooms.

RETAINING ROOMS; DESCRIPTION.

SEC. 1. Separate compartments, to be known as "retaining rooms," or other special places for final inspection, shall be set apart at all official establishments, and all carcasses and parts marked with a "U. S. Retained" tag shall be held in these rooms pending final inspection. These rooms shall be rat proof, large enough for carcasses to hang separately, furnished with abundant light, and provided with sanitary tables and other necessary apparatus; the floors shall be of cement, asphalt, metal, or brick laid in cement, and shall have proper sewer connections. They shall be provided with facilities for locking, and locks for this purpose will be furnished by the Department. The keys to such locks shall remain in the custody of the inspector or his assistant. In establishments where it is impracticable or undesirable to have refrigeration in the retaining room, rooms may be constructed in the cooler for the reception and chilling of carcasses not affected with infectious diseases but which require further inspection.

AFTER FINAL INSPECTION.

SEC. 2. Retained carcasses shall be subjected to a final inspection, and immediately after this is completed those found to be wholesome and fit for human food shall be released by the veterinary inspector conducting the inspection, who shall remove the "U. S. Retained" tags, and the carcasses shall be removed from the retaining room and marked "Inspected and Passed," as provided in Regulation 17, Section 5.

DISINFECTION.

SEC. 3. The floors and walls of all retaining rooms shall be washed with hot water and disinfected after diseased animals are removed and before any "retained" carcasses are again placed therein.

Regulation 15. "Condemned" Rooms.**CONDEMNED ROOMS; DESCRIPTION.**

SECTION 1. In each establishment at which condemned carcasses or meat food products are held until the day following their condemnation there shall be provided a room entirely separate from all other rooms in the establishment. This room shall be secure, rat proof, and shall be provided with a lock, the key of which shall remain in the custody of a Department employee. This room shall be known as the "condemned room," and shall be kept locked at all times except when condemned meat or meat food product is being taken into or from the said room under the supervision of a Department employee. The condemned room shall be kept clean.

DISPOSAL OF UNFIT CARCASSES OR PARTS.

SEC. 2. Carcasses or parts of carcasses found on final inspection to be unsound, unhealthful, unwholesome, or otherwise unfit for human food shall be marked "U. S. Inspected and Condemned," as provided in Regulation 17, Section 4, and shall be immediately removed from the retaining room to the "condemned room," if such condemned room is provided. In case no condemned room is provided they shall be locked in the retaining room and shall be tanked at or before the close of the day on which they are condemned.

SPEEDY DISPOSAL OF CONDEMNED CARCASSES.

SEC. 3. Condemned carcasses shall not be allowed to accumulate, but shall be removed from the "condemned room," denatured as provided in Regulation 16, Section 3, or tanked within a reasonable time after condemnation.

TRUCKS PROVIDED.

SEC. 4. A truck or trucks of sufficient capacity, plainly marked, and which can be locked or sealed, shall, when required by the inspector in charge, be provided for handling condemned meat.

Regulation 16. Tank Rooms, Tanks, and Tanking.**TANKS, ETC.; SEPARATE COMPARTMENTS.**

SEC. 1. All tanks and equipment used for rendering and preparing edible product shall be in compartments separate from those used for rendering inedible product, and there shall be no connection by means of pipes or otherwise between the tanks or departments containing inedible product and those containing edible product. This provision must be complied with on or before October 1, 1908.

METHOD OF TANKING.

SEC. 2. Paragraph 1. All condemned carcasses, parts of carcasses, and meat food products shall be tanked as follows:

Paragraph 2. After the lower opening and the draw-off valves of the tank have been securely sealed by an employee of the Department and the condemned carcasses, parts, and meat food products are placed therein in his presence, the upper opening shall be likewise securely sealed by such employee, whose duty it shall be then to see that a sufficient force of steam (not less than 40 pounds, producing a temperature of 288 degrees Fahrenheit) is turned into the tank and maintained a sufficient time (not less than six hours) effectually to render the contents unfit for any edible product. Wire and lead seals are provided by the Department for sealing tanks. Proprietors of establishments are required to equip all tanks used for condemned products so that they may be securely sealed in the manner above specified.

Paragraph 3. A sufficient quantity of coloring matter or other substance to be designated by the Department shall be used in connection with the rendering of all condemned carcasses, parts of carcasses, meat, or meat food products to destroy them effectually for food purposes.

Paragraph 4. The seals of tanks containing condemned meat or the tankage thereof shall be broken only by an employee of the Department, and such employee shall supervise the drawing off of the contents of such tanks and the marking of the tallow and grease as inedible.

Paragraph 5. If an official establishment fails to permit the treatment and tanking of condemned carcasses, parts of carcasses, meat, or meat food products as required by these regulations, the inspector in charge shall report that fact to the Department, in order that inspection may be withdrawn from such establishment.

IN THE ABSENCE OF TANKING FACILITIES.

SEC. 3. Any meat or meat food products condemned at establishments which have no facilities for tanking shall be freely slashed with a knife and then denatured with crude carbolic acid or other prescribed agent, and then removed to an establishment indicated by the inspector in charge and there tanked and rendered under the supervision of an employee of the Department; or such meat or meat food products may be destroyed by incineration under the supervision of an employee of the Department.

Regulation 17. Tags, Brands, Stamps.

"U. S. SUSPECT" TAG.

SECTION 1. To each animal inspected under Regulation 11 which shows symptoms or is suspected of being affected with any disease or

condition which under these regulations may cause its condemnation in whole or in part on post-mortem inspection there shall be affixed by a Department employee at the time of inspection a numbered metal tag bearing the words "U. S. Suspect," which shall remain upon the animal until final post-mortem inspection, when the carcass shall be marked according to the conditions found, and disposed of as elsewhere provided in these regulations.

"U. S. CONDEMNED" TAG.

SEC. 2. To the ear of each animal which is found in a dying condition or dead on the premises of an establishment there shall be affixed by a Department employee a numbered tag bearing the words "U. S. Condemned." The ear bearing the tag shall not be removed from the carcass. The number of this tag shall be reported to the inspector in charge by the employee who affixes it. This tag shall accompany the condemned carcass into the tank, and the Department employee who is supervising the tanking shall make a report of the number to the inspector in charge.

"U. S. RETAINED" TAG.

SEC. 3. Upon each carcass, or part or detached organ thereof, inspected under Regulation 12, in which any lesion of disease or other condition is found that might render the meat or any organ unfit for food purposes, and which for that reason would require a subsequent inspection, there shall be placed by a Department employee at the time of inspection a tag, numbered in duplicate, bearing the words "U. S. Retained," and such other marks of identification shall be used as shall be approved by the Chief of the Bureau of Animal Industry. The inspector who attaches this "U. S. Retained" tag shall detach the numbered stub thereof and forward it with his report to the inspector in charge. The other portion shall accompany the carcass to the retaining room.

"U. S. INSPECTED AND CONDEMNED."

SEC. 4. Each carcass, or part or detached organ thereof, which is found on final inspection to be unsound, unhealthful, unwholesome, or otherwise unfit for human food shall be marked conspicuously by a Department employee at the time of inspection with the words "U. S. Inspected and Condemned." The "U. S. Retained" tag shall accompany the carcass into the tank, and the number thereof shall be reported by the employee who supervises the tanking. If, however, upon final inspection the carcass or part thereof is passed, the "U. S. Retained" tag shall be removed and returned to the inspector in charge. A record of the tag showing the serial number, the final disposal of the carcass or part to which it was affixed, the date, and the name of the inspector shall be forwarded with the regular reports to the inspector in charge.

MARKING PASSED CARCASSES.

SEC. 5. Upon all passed carcasses slaughtered under inspection there shall be placed by an employee of the Department, or by an employee of the establishment under the supervision of an employee of the Department, meat-inspection marks bearing the words "Inspected and Passed," or an authorized abbreviation thereof, and such other matter as may be required by the Department. The number of marks, their location on the carcass, and the time they shall be affixed, shall be determined by the Chief of the Bureau of Animal Industry.

MARKING PRIMAL PARTS.

SEC. 6. Paragraph 1. Each passed primal part or the true container thereof must be marked under the supervision of a Department employee, with the words "Inspected and Passed," or an authorized abbreviation thereof, and the official establishment number, except as provided in paragraphs 2 and 3 of this section and in Section 12 of Regulation 25.

PRIMAL PARTS BETWEEN ESTABLISHMENTS.

Paragraph 2. When primal parts are shipped from one official establishment to another for further processing, it is not obligatory that the inspection legend appear on such primal parts, but the container thereof in the case of a package shall be marked as specified in Section 9 of this regulation, and in the case of a car shall be sealed; in such cases the primal parts, after processing, shall show plainly the inspection legend and the number of the official establishment at which the processing was completed.

EXPORT PORK.

Paragraph 3. Passed primal parts of pork intended for export need not be marked with the authorized marks of inspection, but all outside containers shall bear the meat-inspection stamp.

BRANDING IRONS.

SEC. 7. The inspection legend or an authorized abbreviation thereof may be affixed, under the supervision of a Department employee, to hams, bacon, and similar primal parts with a hot branding iron, and when so affixed will be recognized as the official mark of inspection. When hot branding irons are used to affix trade brands or descriptions, such brand or description must be distinct and apart from the inspection legend.

MARKING REINSPECTED MEATS AND MEAT FOOD PRODUCTS.

SEC. 8. Upon all meat food products which are suspected on reinspection of being unsound, unhealthful, unwholesome, or otherwise unfit for human food, or upon the containers thereof, there shall be placed by a Department employee at the time of reinspection the "U. S. Retained"

tags hereinbefore described. The employee who affixes the tag shall send the numbered stub with his report to the inspector in charge. These tags shall accompany the said meats or meat food products to the retaining room or other special place for final inspection. When the final inspection is made, if the meat or meat food product be condemned, the "U. S. Retained" tag shall be stamped "U. S. Inspected and Condemned," and shall accompany the condemned meat or meat food product to the tank, and the inspector shall report his action to the inspector in charge. If, however, upon final inspection the meat or meat food product is passed for food, the inspector shall stamp the retained tag "Inspected and Passed" and return the tag with his report to the inspector in charge.

DOMESTIC MEAT LABEL.

SEC. 9. When meat products for domestic trade have been inspected and passed, the outside containers of such meat shall bear (in lieu of meat-inspection stamp) a domestic meat label which has been submitted to and approved by the Department, showing the official establishment number and the following legend: "The meat contained herein has been inspected and passed under the provisions of the Act of June 30, 1906." The firm name may also appear on the label if desired. The dimensions of the label shall be not less than 4 inches by 2 $\frac{1}{4}$ inches. Outside containers if bearing approved trade labels are not required to be provided with the label above described. Domestic meat labels shall be affixed to packages in the manner prescribed in Regulation 24 for affixing labels to export packages.

MARKING EXPORTS.

SEC. 10. Each outside container (except cloth wrappings) of export meat or meat food products shall be marked with a meat-inspection stamp. The cloth wrappings of inspected and passed meat which is so marked shall be marked with an authorized mark of inspection.

"PRESERVATIVE" STAMP.

SEC. 11. Upon each container of meat or meat food products, such as ham, bacon, etc., prepared for export with preservatives under Regulation 22, Section 3, Paragraph 1, there shall be placed, under the personal supervision of a Department employee, a special stamp for marking such meats, known as the "Preservative" stamp. All outside containers of such meat or meat food products shall bear the "Preservative" stamp.

Regulation 18. Trade Labels.

TRADE LABELS.

SECTION 1. Upon each can, pot, tin, canvas, or other receptacle or covering containing any meat or meat food product, which meat or meat

food product does not bear the marks "Inspected and Passed," there shall be securely affixed, under the supervision of a Department employee, a trade label before such meat or meat food product leaves an official establishment. This trade label shall contain, in plain letters and figures of uniform size, the words "U. S. Inspected and Passed," the number of the official establishment at which the meat or meat food product is last processed, and the true name of the meat or meat food product contained in such package. The words "under the Act of Congress of June 30, 1906," may be placed upon the label after the words "U. S. Inspected and Passed." An inspector shall not allow trade labels affixed until he is satisfied that the contents of the package are sound, healthful, wholesome, and fit for human food, in accordance with the statements on the label."

PROOFS TO BE APPROVED, ETC.

SEC. 2. Duplicate copies of each trade label in the form of sketches or proofs shall first be submitted to the Department, and no trade label shall be used until a sketch or proof thereof has been approved. After trade labels are printed from approved proofs or sketches they shall be forwarded in triplicate to the Department for approval and filing.

WHEN NOT TO BE USED.

SEC. 3. No trade label bearing the words "U. S. Inspected and Passed," or any abbreviation or simulation thereof, shall be used on meat or meat food products which have not been inspected and passed under these regulations, and no trade label bearing the inspection legend, or any abbreviation or simulation thereof, shall be placed upon meat or meat food products except under the supervision of an inspector.

TIN CONTAINERS EMBOSSED OR LITHOGRAPHED.

SEC. 4. Tin containers, embossed or lithographed with the label as prescribed in Section 1, will be considered as bearing trade labels. On and after October 1, 1908, all sealed tin containers must have the number of the official establishment where packed embossed, lithographed, or printed thereon.

ESSENTIAL FEATURES.

SEC. 5. The essential features of a trade label are as follows, and shall appear upon each label:

- The true name of the product.
- The inspection legend.
- The establishment number.

THE INSPECTION LEGEND.

SEC. 6. The inspection legend "U. S. Inspected and Passed," or an

authorized abbreviation thereof, and the official establishment number in plain characters of uniform size, which shall be in proper proportion to the general lettering of the label, must be separately and prominently embodied in all trade labels.

STICKERS, DETACHABLE DEVICE, ETC.

SEC. 7. In the case of meat contained in cartons, or in wrappers of paper, cloth, or other similar substance, the inspection legend and the official establishment number may be embodied in a sticker or seal of proportionate size prominently displayed with the trade label but not necessarily a part of the trade label, such stickers or seals to be approved by the Department of Agriculture. It is not permissible to affix to meat or meat food products a detachable device of any kind which bears the inspection legend.

EXPORT LABELS AND BRANDS.

SEC. 8. While labels to be affixed for foreign shipment may be printed in a foreign language, the same rules shall apply with reference to false labeling and the naming of ingredients as shall apply to goods prepared for domestic use. The inspection legend and the official establishment number must in all cases appear in English; but if desired they may in addition, literally translated, appear in the language of the country to which the package is destined.

PRODUCTS PREPARED FOR ANOTHER ESTABLISHMENT.

SEC. 9. Paragraph 1. When an article is prepared by an official establishment for another firm or individual, if the name of the said firm or individual is to appear upon the label the statement must be made that the article was "prepared for" or "manufactured for" the firm or individual. Names of subsidiary companies which have legal entity may be used without the prefix "prepared for" or "manufactured for."

Paragraph 2. When a firm or individual not operating under Federal inspection desires to reship inspected and passed meat that has been processed only under Government inspection and is eligible under these regulations for interstate shipment he may affix to the package the following statement: "The meat contained herein has been inspected and passed at an establishment where Federal inspection is maintained."

FALSE OR DECEPTIVE NAMES.

SEC. 10. No meat or meat food products shall be sold or offered for sale by any person, firm, or corporation under any false or deceptive name; but the established trade name or names which are usual to such products, which are not false and deceptive and which shall be approved by the Secretary of Agriculture, are permitted.

MISLEADING PICTURES, DESIGNS, OR DEVICES.

SEC. 11. No picture, design, or device which gives any false indication of origin or quality shall be used upon any label. The law prohibits any statement, design, or device false in any particular regarding the virtues or properties of the materials contained in the package.

THE PRINCIPAL INGREDIENT.

SEC. 12. A meat food product when composed of more than one ingredient shall not bear a trade label with a name stating or purporting to show that the said meat food product is a substance which is not the principal ingredient contained therein, even though such name be an established trade name.

ADDED SUBSTANCE.

SEC. 13. A meat food product that contains a substance or substances, including water, added for the purpose of adulteration and which lessens its food value shall bear a label stating that such substance or substances have been added.

STATEMENT OF WEIGHT.

SEC. 14. When any weight is given upon the true container it must be the correct weight, and it must be stated whether this weight is the net weight or the gross weight.

Regulation 19. Reinspection.**REINSPECTION OF PASSED CARCASSES AND PARTS.**

SECTION 1. Immediately before shipment and at such other times as may be deemed necessary all carcasses or parts thereof, whether fresh or cured, that have been previously inspected and passed shall be reinspected by the inspector in charge or his assistants, in such manner as shall be prescribed by the Chief of the Bureau of Animal Industry, and if upon any such reinspection any carcass or part thereof is found to have become unsound, unhealthful, unwholesome, or in any way unfit for human food the original mark, stamp, tag, or label shall be destroyed or defaced and the carcass or part shall be condemned.

REINSPECTION OF INSPECTED MEAT RECEIVED AT OFFICIAL ESTABLISHMENTS.

SEC. 2. Except as provided in Regulation 20, only carcasses and parts thereof, meat, or meat food products which have not been processed except under Government supervision, and which can be identified by marks, seals, brands, or labels as having been previously inspected and passed by a Department employee, shall be taken into or allowed to enter an official establishment. All such carcasses, parts, meat, or meat food

products which are brought into one official establishment from another, or which are returned to the establishment from which they issued, shall be identified and reinspected at the time of receipt, and shall be subject to further reinspection in such manner and at such times as may be deemed necessary. If upon any such reinspection any carcass or part thereof, or meat or meat food product, is found to have become unsound, unhealthful, unwholesome, or in any way unfit for human food, the original mark, stamp, tag, or label shall be defaced or destroyed, and the carcass, part, meat, or meat food product shall be condemned.

SPECIAL PLACES FOR RECEIPT AND INSPECTION.

SEC. 3. Special docks and receiving rooms shall be designated by the establishment for the receipt and inspection of all meat or meat food products, and no meat or meat food products shall be allowed to enter the establishment except in the presence of a Department employee.

RETURNED FATS FROM INSPECTED CARCASSES.

SEC. 4. Unrendered fats from carcasses which have been inspected and passed may be returned and received into official establishments, provided the fats have been handled in a sanitary manner after leaving the establishment, and provided further that upon inspection the fats are found to be clean, sweet, wholesome, and fit for human food. However, the return of such fats to official establishments and the manner in which they shall be handled from the time they leave such establishments until their return thereto shall be governed by such specific instructions as may be issued from time to time by the Chief of the Bureau of Animal Industry.

INEDIBLE FATS.

SEC. 5. Inedible fats may be received only into the tank room provided for inedible products, and when so received they shall not enter any compartment used for edible products.

MARKET INSPECTION.—EACH CITY ASSIGNED A NUMBER.

SEC. 6. Paragraph 1. In order to provide for the interstate transportation, from public markets and other places, of portions of inspected and passed carcasses, parts, and meat food products which, when cut or otherwise removed from a marked carcass, part, or container, do not show the inspection mark and can not therefore be identified as having been inspected and passed, market inspection may be furnished. Each city in which market inspection is established will be assigned a number, and all products forwarded under such inspection shall bear the inspection legend and the official number assigned to the city.

UNMARKED PORTIONS MARKED.

Paragraph 2. Unmarked portions which are cut from the marked carcass or part, or are removed from the marked container for interstate transportation, shall be marked by a Department employee. Wherever practicable the brand shall be applied to the meat itself; where this can not be done the true container of the meat or meat food product shall be marked as required by the Chief of the Bureau of Animal Industry.

REQUIREMENTS OF SANITATION, ETC.

Paragraph 3. All market stalls or other places which are given market inspection shall be maintained in a sanitary condition and shall also conform to the requirements of the Department governing the use of drugs, chemicals, dyes, and preservatives.

Regulation 20. Carcasses of Animals not Inspected Ante-Mortem.**CARCASSES OF ANIMALS NOT INSPECTED ANTE-MORTEM.**

SECTION 1.¹ Carcasses of animals which have had no ante-mortem inspection by inspectors of the Bureau of Animal Industry will not, except as hereinafter provided, be admitted into an official establishment. The exception to this rule applies only to carcasses to which the head and all viscera, except the stomach, bladder, and intestines, are held by the natural attachments. Such carcasses, if offered for admission into official establishments, shall be inspected, and if found to be free from disease and otherwise sound, healthful, wholesome, and fit for human food they shall be marked "Inspected and Passed" and admitted. If found to be diseased, unsound, unhealthful, unwholesome, or otherwise unfit for human food, they shall be marked "U. S. Inspected and Condemned," and the proprietor of the establishment shall be required to destroy them for food purposes, as provided in Regulation 16, Section 2.

Regulation 21. Tank Cars.**TANK CARS; MUST BE SEALED.**

SECTION 1. Tank cars carrying edible meat food products into interstate or foreign commerce shall be provided with proper appliances for sealing and be securely sealed with seals furnished by the Department and affixed by Department employees.

TRANSFER OF CONTENTS TO BOATS.

SEC. 2. When such products for export are transferred from tank cars to other containers on boats, such transfer shall be under Govern-

¹ Formerly Regulation 62, B. A. I. Order 137.

ment supervision, and the said containers on boats shall likewise be sealed.

Regulation 22. Dyes, Chemicals, and Preservatives.

DYES, PRESERVATIVES, ETC.; WHAT PROHIBITED.

SECTION 1. No meat or meat food product shall contain any substance which lessens its wholesomeness, nor any drug, chemical, dye, or preservative, except as hereinafter provided.

WHAT IS PERMITTED.

SEC. 2. Paragraph 1. There may be added to meat or meat food products common salt, sugar, wood smoke, vinegar, pure spices, and saltpeter. Only such coloring matters as may be designated by the Secretary of Agriculture as being harmless may be used, and these only in such manner as the Secretary of Agriculture may designate.

Paragraph 2. Substances necessary for the preparation, clarification, or refining of meat food products will be permitted to be used subject to the approval of the Secretary of Agriculture, provided they are eliminated from the meat food products during the further process of manufacture.

PRESERVATIVES PERMITTED FOR EXPORT PRODUCTS.

SEC. 3. Paragraph 1. In accordance with the written direction of the foreign purchaser or his agent, meat or meat food products prepared for export may contain preservatives of a kind and in proportions which do not conflict with the laws of the foreign country to which they are to be exported, but when such meat or meat food products are prepared for export under this regulation they shall be prepared in compartments of the establishment separate and apart from those in which meat or meat food products are prepared for the domestic trade, and such products shall be kept separate. Distinctive export certificates and stamps will be issued for meat or meat food products of this character, but, if the products are not exported, under no circumstances shall they be allowed to enter domestic trade.

PROCESS OF PACKING WHEN CERTAIN PRESERVATIVES ARE USED.

Paragraph 2. The packing of meat which is prepared, as provided in paragraph 1 of this section, with any preservative not permitted by paragraph 1, section 2, may be done in the regular packing room, provided that no other meat is allowed in the packing room during the time of such packing. After such packing is completed the packing room shall be thoroughly cleansed of the preservative before the packing of other meat therein is resumed. A separate compartment constructed of tight partitions or walls shall be set apart of storing the preservative

trays and other appliances used in connection with the packing. The Department will furnish a lock and key for this compartment, and the packing of all meat under this section shall be conducted under the personal supervision of an employee of this Department.

Regulation 23. Preparation of Meat and Meat Food Products.

PROCESSES, APPLIANCES, ETC.

SECTION 1. All processes used in curing, pickling, rendering, canning, or otherwise preparing meat or meat food products in official establishments shall be supervised by Department employees. No fixtures or appliances, such as tables, trucks, trays, tanks, vats, machines, implements, cans, or containers of any kind shall be used unless they are clean and sanitary. All steps in the process of manufacture shall be conducted carefully and with strict cleanliness. All salt pickling fluids, and other solutions or substances used in curing meat must be clean.

STERILIZATION, RECOOKING, ETC., OF CANNED PRODUCTS.

SEC. 2. Canned meat or meat food products which require sterilization to preserve them must be subjected to this process on the same day that the cans are filled. Defective or leaking cans discovered after the process of sterilization has been completed shall not be repaired or repacked (unless such repairing or repacking is done within six hours of the time of original sterilization), but the contents of such cans shall be removed and condemned.

POTATO FLOUR, CEREALS, WATER.

SEC. 3. Potato flour shall not be used in the preparation of sausage, nor shall excessive quantities of cereals or water be used.

RENDERING.

SEC. 4. Paragraph 1. The manufacture of all fats into lard, tallow, oils, and stearin at official establishments shall be closely supervised by employees of the Department, who shall see that all portions of carcasses rendered into edible products are clean and wholesome.

HEADS.

Paragraph 2. Heads rendered into edible product shall first be split, cross sectioned, and thoroughly washed and cleaned.

HOGS' FEET.

Paragraph 3. When hogs' feet are used for lard, the hair, hoofs, and the tissues of the interdigital spaces must be removed.

PIPES OF DIFFERENT COLORS FOR EDIBLE AND INEDIBLE FATS.

Paragraph 4. All pipes and similar conveyers used in conducting edible fats from one receptacle or container to another shall be of a distinctly different color from the pipes and similar conveyers used in conducting inedible fats from one receptacle or container to another.

DIAGRAMS OF PIPE LINES.

Paragraph 5. Blueprints or other accurate diagrams showing all underground pipe lines or other conveyers used to conduct edible and inedible products at official establishments and also those extending from official establishments to other establishments, either official or unofficial, with a description giving the exact location, terminals, and dimensions of such pipes, or other conveyers, and of all gates, valves, or other controlling apparatus, shall be filed with the Department, and a copy of such prints or diagrams shall be filed with the inspector in charge. The prints or diagrams should designate the lines used for conveying edible products and those used for conveying inedible products. If no such underground pipes or conveyers are used for the purposes above indicated, a written statement certifying to this fact and duly signed by the management of each establishment shall be filed with the Department.

CONTAINERS OF INEDIBLE PRODUCTS TO BE MARKED.

Paragraph 6. All containers, such as vats and tierces, in which white grease or other inedible meat products are placed, shall be plainly marked "inedible" in such a manner that they can be readily identified.

PERMANENT CONTAINERS.

Paragraph 7. Final containers, such as tierces, shall be appropriately marked on both ends immediately after filling.

CASINGS.

SEC. 5. The only animal casings that may be used as containers in the manufacture of sausage under these regulations are those from cattle, hogs, sheep, or goats.

Regulation 24. Stamps for Export Packages.

EXPORT STAMPS.

SECTION 1. Paragraph 1. Numbered meat-inspection stamps shall be affixed to packages (except those in cloth wrappings) containing meat or meat food products to be shipped or otherwise transported in foreign trade.

PROTECTION FOR STAMPS.

Paragraph 2. Stamps shall be affixed in the following manner, and when they have been affixed they shall be covered immediately with a coating of transparent varnish or other similar substance.

IN A GROOVED SPACE.

(a) The stamp may be affixed in a grooved space made by removing a portion of the wood of sufficient size to admit the stamp.

ON THE ENDS.

(b) The stamp may be placed on either end of the package, provided that the sides are made to project at least one-eighth of an inch to afford the necessary protection from abrasion.

FOR INEDIBLE PRODUCTS.

SEC. 2. Inedible-product stamps and certificates may, upon request, be issued to accompany shipments for export of casings, bladders, bungs, hoofs, and other similar inedible animal products.

Regulation 25. Transportation.¹**EXPORT CERTIFICATES; WHEN ISSUED.**

SECTION 1. Upon the application of the exporter the inspector in charge of an establishment is authorized to issue certificates for export shipments of inspected and passed meat or meat food products. The certificate should be issued at the time the product leaves the establishment; if, however, the certificate is not issued at that time, it can only be issued upon identification and reinspection of the product.

FORM AND MATTER.

SEC. 2. These certificates shall be issued in serial numbers and in triplicate form. Each certificate shall show the names of the exporter, and the consignee, the destination, the numbers of the stamps attached to the article to be exported, the shipping marks, the kind of product, and the weight.

ONE CERTIFICATE FOR EACH CONSIGNMENT.

SEC. 3. Only one certificate shall be issued for each consignment unless otherwise directed by the Chief of the Bureau of Animal Industry.

¹ The transportation of meat or meat food product from one point in a State or Territory to another point in the same State or Territory, when in course of shipment the meat or meat food product is taken through another State or Territory, is interstate commerce.

DISPOSAL OF ORIGINAL AND DUPLICATE CERTIFICATES.

SEC. 4. Both the original and duplicate certificates shall be delivered by the inspector to the shipper. The copy of certificate provided by law to be delivered to the chief officer of the vessel shall be the duplicate copy and shall be filed with the customs officers at the time of filing the master's manifest or the supplemental manifest.

CERTIFICATE NECESSARY TO PROCURE TRANSPORTATION.

SEC. 5. No master of any steam or sailing vessel shall receive for transportation or transport from the United States to Great Britain or Ireland, or any of the countries of continental Europe, or to Argentina or Mexico, any carcass, part of carcass, or meat food product of cattle, sheep, swine, or goats, except ship stores, unless and until a certificate of inspection covering the same has been issued and delivered as provided in this regulation. The requirement of export certificates is waived for meat and meat food products to foreign countries other than those hereinbefore named.

INEDIBLE GREASE AND INEDIBLE TALLOW.

SEC. 6. When inedible grease, inedible tallow, or inedible stearin derived from cattle, sheep, swine, or goats is offered for export, the collectors of customs, under instructions from the Secretary of Commerce and Labor, will require an affidavit from the exporter that the products to be exported are inedible and are not intended for food purposes.

REQUIREMENT OF CERTIFICATES.

SEC. 7.¹ No person, firm, or corporation shall receive for transportation or transport from one State or Territory or the District of Columbia to another State or Territory or the District of Columbia, any carcass, part of carcass, or meat food product of cattle, sheep, swine, or goats unless and until a certificate is made and furnished in one of the forms prescribed in sections 11, 12, 13, and 14 of this regulation, showing that such meat or meat food product has been either inspected and passed or exempted from inspection, according to Act of Congress of June 30, 1906: *Provided*, That printed certificates in the forms formerly required and now on hand may be used for this purpose. It is necessary, as old stocks of printed certificates are exhausted, that new ones be printed in the new forms.

MOVEMENT IN PART FOREIGN.

SEC. 8.¹ When any shipment of meat or meat food products covered by these regulations is offered to any common carrier for carriage within

¹ Formerly Regulation 52, B. A. I. Order 137.

the United States as a part of a foreign movement, the same certificate shall be required as if the shipment was destined to a point within the United States.

DIVERSION OF SHIPMENT AND BREAKING OF SEALS IN EMERGENCY.

SEC. 9.¹ Paragraph 1. Shipments of inspected and passed meat or meat food products that are so marked may be diverted from the original destination without a reinspection of the product, if a new certificate showing the changed destination be given to the carrier by the owner or shipper, who may or may not be the original shipper; or in a case of a wreck or other extraordinary emergency the carrier may divert such shipments from the original destination without a new shippers' certificate.

Paragraph 2. The Government seals on a car containing inspected and passed meat or meat food products may be broken by the carrier in case of wreck or other extraordinary emergency, and if necessary the product may be reloaded into another car or the shipment may be diverted from the original destination without another shippers' certificate; but in all such cases the carrier shall immediately report the transaction by telegraph to the Chief of the Bureau of Animal Industry, Washington, D. C. Such report shall include the information indicated below:

- (a) Nature of the emergency.
- (b) Place where seals were broken.
- (c) Original points of shipment and destination.
- (d) Number and initials of the original car.
- (e) Number and initials of the car into which the product is reloaded.
- (f) New destination of the shipment.
- (g) Kind and amount of product.

RESHIPMENT OF INSPECTED PRODUCTS.

SEC. 10.¹ Reshipments of inspected meat or meat food products which are sound and wholesome at the time of reshipment may be made without reinspection when the meat or meat food products, or the containers thereof, are marked "Inspected and Passed," and the meat or meat food products have not been processed since they were originally shipped under section 11 of this regulation. Also jobbers, wholesalers, or others who do no processing, and who receive "Inspected and Passed" meat or meat food products, may break bulk, repack, and reship the same into interstate commerce under Section 11 of this regulation, if each piece of meat or meat food product in the unmarked package bears the original authorized mark of Government inspection. Inspection shall be maintained at the establishments of all such jobbers, wholesalers, or others who do any processing.

¹ Formerly Meat Inspection Rulings 1 A.

CERTIFICATE FOR INSPECTED MEAT AND MEAT FOOD PRODUCTS.

SEC. 11.¹ When any carcass, part of carcass, or meat food product of cattle, sheep, swine, or goats which has been inspected and passed and so marked under these regulations is offered to any common carrier for transportation from one State or Territory or the District of Columbia to another State or Territory or the District of Columbia for interstate shipment only, or for interstate shipment as part of a foreign movement, or for foreign shipment, the person, firm, or corporation offering such carcass, part of carcass, or meat food product shall make a certificate in the following form and deliver the same to the said common carrier, except as provided in section 12 of this regulation.

Date190..
 Name of common carrier
 Shipper
 Point of shipment
 Consignee
 Destination

I hereby certify that the meat or meat food products described herein, which are offered for shipment in interstate or foreign commerce, have been inspected and passed according to Act of Congress of June 30, 1906, are so marked, and at this date are sound, healthful, wholesome, and fit for human food.

Kind of product.	Amount and weight.
.....
.....
.....

.....
 (Signature of shipper.)

.....
 (Address of shipper.)

This certificate may be stamped upon or incorporated in any form which is regularly or ordinarily used in the shipment of meat or meat food products.

SHIPMENTS BETWEEN INSPECTED ESTABLISHMENTS.

RAILROAD CAR.

SEC. 12.¹ Paragraph 1. An official establishment may ship from the said establishment to any other official establishment any meat or meat food product which has been inspected and passed under these regulations without marking the same "Inspected and Passed," if such shipment be placed in a railroad car which is sealed by an employee of the Bureau of Animal Industry, and provided that not less than twenty-five percent

¹ Formerly Regulation 53, B. A. I. Order 137.

¹ Formerly Regulation 54, B. A. I. Order 137.

of the contents of each car consists of meat or meat food products not marked "Inspected and Passed."

WAGONS.

Paragraph 2. Wagons so equipped that they can be securely sealed by a Department employee may be considered as true containers.

CERTIFICATE.

Paragraph 3. When shipments are made under paragraph 1 of this section the shipper shall make for each car and deliver to the common carrier in duplicate a certificate in the following form:

Date	190..
Name of common carrier	
Establishment number of consignor	
Point of shipment	
Establishment number of consignee	
Destination	
Car number and initials	
I hereby certify that the following-described meat or meat food products have been inspected and passed according to Act of Congress of June 30, 1906. They are not marked "Inspected and Passed," but have been placed in the above car under the supervision of an employee of the Bureau of Animal Industry which was sealed by him with Government seals Nos. and	
Kind of product.	Amount and weight.
.....
.....
.....
.....	
(Signature of shipper.)	
.....	
(Address of shipper.)	

The duplicate certificate shall be forwarded immediately by the initial carrier to the Chief of the Bureau of Animal Industry, Washington, D. C. Attention is directed to the law which provides a penalty of fine and imprisonment for any unauthorized person who breaks a seal of such cars.

When shipments are made under this section the inspector in charge at point of origin shall duly notify the Chief of the Bureau of Animal Industry and the inspector in charge at point of destination.

RETAIL BUTCHERS AND DEALERS.

Sec. 13.¹ When any carcass, part of carcass, or meat food product

¹ Formerly Regulation 55, B. A. I. Order, 137.

of cattle, sheep, swine, or goats which has not been inspected under these regulations is offered for shipment from one State or Territory or the District of Columbia to another State or Territory or the District of Columbia by any retail butcher or retail dealer who holds a certificate of exemption issued by the Secretary of Agriculture, the common carrier shall require a certificate to be made in duplicate in the following form¹ by said retail butcher or retail dealer, which certificate shall in all cases show the exemption number designated by the Secretary of Agriculture for said retail butcher or retail dealer:

Date.....190..

Name of common carrier

Shipper

Point of shipment

Consignee

Destination

Number of exemption certificate

I hereby certify that I am a retail butcher or a retail dealer in meat or meat food products; that the following-described meat or meat food products are offered for shipment in interstate commerce to a customer, as exempted from inspection according to Act of Congress of June 30, 1906, under certificate issued to me by the United States Department of Agriculture, and that at this date they are sound, healthful, wholesome, and fit for human food, and contain no preservative or coloring matter or other substance prohibited by the regulations of the Secretary of Agriculture governing meat inspection.

Kind of product.	Amount and weight.
.....
.....
.....

.....
(Signature of shipper.)

.....
(Address of shipper.)

The duplicate certificate shall be forwarded immediately by the initial carrier to the Chief of the Bureau of Animal Industry, Washington, D. C. This certificate shall be separate and apart from any waybill, bill of lading, or other form ordinarily used in the shipment of meat.

FARMERS' PRODUCTS.

SEC. 14.¹ When any cattle, sheep, swine, or goats have been slaughtered by any farmer on the farm, and the carcasses, parts of carcasses,

¹ Formerly Regulation 56, B. A. I. Order 137.

or meat food products thereof are offered to any common carrier for transportation from one State or Territory or the District of Columbia to another State or Territory or the District of Columbia, the common carrier may so transport such carcasses, parts of carcasses, or meat food products as long as the same may be identified as of animals slaughtered by any farmer on the farm.

The common carrier shall require a certificate in duplicate in the following form:

Date.....190..
 Name of common carrier
 Shipper
 Consignee
 Point of shipment
 Destination

I hereby certify that the following-described uninspected meat or meat food products are from animals slaughtered by a farmer on the farm, and are offered for transportation in interstate commerce as exempted from inspection according to Act of Congress of June 30, 1906, and that at this date they are sound, healthful, wholesome, and fit for human food, and contain no preservative or coloring matter or other substance prohibited by the regulations of the Secretary of Agriculture governing meat inspection.

Kind of product.	Amount and weight.
.....
.....
.....

.....
 (Signature of shipper.)

.....
 (Address of shipper.)

The duplicate certificate shall be forwarded immediately by the initial carrier to the Chief of the Bureau of Animal Industry, Washington, D. C.

ORIGINAL CERTIFICATES FILED BY INITIAL CARRIER.

SEC. 15.¹ All original certificates delivered to the common carrier, as required by this regulation, shall be filed and retained for one year by the initial carrier, in order that they may be readily checked by this Department in such manner as the Secretary of Agriculture may from time to time prescribe.¹

¹ Formerly Regulation 57, B. A. I. Order, 137.

¹ Stocks of printed certificates now on hand may be used, but as new supplies are printed they should conform to the forms prescribed.

WAYBILLS, ETC.

SEC. 16.² All waybills, transfer bills, running slips, or conductor's cards accompanying an interstate or foreign shipment of meat or meat food product must have embodied in, stamped upon, or attached to it a signed statement which shall be evidence to connecting carriers that the proper shipper's certificate as required by Sections 11, 12, 13, and 14 of this regulation is on file with the initial carrier, and no connecting carrier shall receive for transportation or transport any interstate or foreign shipment of meat or meat food product unless the waybill, transfer bill, running slip, or conductor's card accompanying the same includes the aforesaid signed statement in one of the following forms:

When shipment is made under Section 11 or 12:

(Name of transportation company.)

United States inspected and passed as evidenced by shipper's certificate on file with initial carrier.

(Signed), Agent.

When shipment is made under Section 13 or 14:

(Name of transportation company.)

Exempted from inspection as evidenced by shipper's certificate on file with initial carrier.

(Signed), Agent.

SHIPMENT BY FERRY.

SEC. 17.³ Paragraph 1. When any carcass, part of carcass, or meat food product of cattle, sheep, swine, or goats loaded on a truck, wagon, cart, or other vehicle, or otherwise prepared for shipment, is offered for transportation or transported by ferry such ferry being the initial carrier from one State, Territory, or the District of Columbia to another State, Territory or District of Columbia, the person, firm, or corporation offering such carcass, part of carcass, or meat food product shall, except as hereinafter provided by paragraph 5, make a certificate in one of the forms hereinafter indicated and deliver the certificate to said common carrier; and no person, firm, or corporation operating a ferry line as aforesaid shall receive for transportation or transport any carcass, part of carcass, or meat food product of cattle, sheep, swine, or goats loaded on a truck, wagon, cart, or other vehicle, or in any other manner prepared for transportation, unless a certificate in one of the forms referred to is properly filled out and delivered by the shipper as herein required.

Paragraph 2. When the shipment consists of inspected and passed meat or meat food products, the form of certificate shown in Section 11 of this regulation shall be used.

² Formerly Regulation 58, B. A. I. Order, 137.

³ Formerly Regulation 65, B. A. I. Order 137.

Paragraph 3. When the shipment is made under exemption and consists of meat or meat food product which has not been inspected and passed, the form of certificate shown in Section 13 of this regulation shall be used, and a duplication shall be forwarded immediately by the ferry company to the Chief of the Bureau of Animal Industry, Washington, D. C.

Paragraph 4. When the shipment consists of meat or meat food products from animals slaughtered by a farmer on the farm and which have not been inspected and passed, the form of certificate shown in Section 14 of this regulation shall be used, and a duplicate shall be forwarded immediately by the ferry company to the Chief of the Bureau of Animal Industry, Washington, D. C.

Paragraph 5. When a shipper's certificate for meat or meat food products has been issued and is on file with the initial carrier and that fact is shown by notation on the billing, the ferry company need not require another certificate.

IMPORTED PRODUCTS.

SEC. 18.¹ Imported meat or meat food products which have not been mixed or compounded with or added to domestic meat or meat food products may be transported by any common carrier from one State or Territory or the District of Columbia to another State or Territory or the District of Columbia if the packages containing them are marked "Inspected under the Food and Drugs Act of June 30, 1906," when received for transportation.

SHIPMENT OF PRODUCTS ALLEGED OR KNOWN TO BE UNFIT FOR FOOD.

SEC. 19.² Paragraph 1. Meat or meat food products which have been inspected and passed and so marked, and which have been transported from the establishments in which they were prepared into the channels of trade, and which are alleged or known to have become unsound, unwholesome, or otherwise unfit for human food, may be transported in interstate commerce only under the following restrictions:

TO AN INSPECTED ESTABLISHMENT.

Paragraph 2. Meat or meat food products inspected and passed and so marked and which are alleged to be unsound, unwholesome, or otherwise unfit for human food may be shipped from one State or Territory or the District of Columbia to any official establishment in the same or a different State or Territory if a written permit in duplicate for such

¹ Formerly Regulation 64, B. A. I. Order, 137.

² Formerly Regulation 61, B. A. I. Order 137.

shipment be first obtained from the inspector in charge of the establishment to which the shipment is destined. In all such shipments both the original and duplicate copies of the permits shall be surrendered to the carrier accepting the meat or meat food product, and the carrier shall require the shipper to furnish three copies of the form of certificate hereinafter given. One of these certificates and the duplicate copy of the permit shall be retained by the carrier; another copy of the certificate, together with the original permit, shall be mailed by the carrier to the Chief of the Bureau of Animal Industry, Washington, D. C., and the third copy of the certificate shall be addressed and mailed by the carrier to the Bureau of Animal Industry inspector in charge at the point to which the shipment is consigned. Upon the arrival of the shipment at the establishment the inspector in charge shall cause a careful inspection to be made of the shipment, to determine whether or not it is unsound, unwholesome, or otherwise unfit for food. Should the meat or meat food product contained in the shipment prove to be unsound, unwholesome, or otherwise unfit for human food, it shall at once be stamped "U. S. Inspected and Condemned" and be immediately tanked or removed to the condemned room. If the meat or meat food product contained in the shipment shall prove to be sound, wholesome, and fit for human food, the inspector shall allow the meat or meat food products to enter the establishment. Meat or meat food products at an official establishment alleged or known to be unsound, unwholesome or otherwise unfit for human food shall not be shipped under this paragraph, but must be disposed of at the establishment.

TO JOBBER, WHOLESALER, OR DEALER.

Paragraph 3. Meat or meat food products which have been inspected and passed and are so marked and are alleged to be unsound, unwholesome, or otherwise unfit for human food may be returned from one State or Territory or the District of Columbia to any jobber, wholesaler, or other dealer from whom the said meat or meat food product was purchased, if a written permit, in duplicate, for such shipment be first obtained from the Chief of the Bureau of Animal Industry. In all such shipments both the original and duplicate copies of the permits shall be surrendered to the carrier accepting the meat or meat food product, and the carrier shall require the shipper to furnish two copies of the form of certificate hereinafter given. One of these certificates and the duplicate copy of the permit shall be retained by the carrier, and the other copy of the certificate, together with the original permit, shall be mailed by the carrier to the Chief of the Bureau of Animal Industry, Washington, D. C. If the meat or meat food product which is shipped under this section shall prove to be unsound, unwholesome, or otherwise unfit for human food it may not be reshipped in interstate commerce as a food product.

FORM OF SHIPPER'S CERTIFICATE.

Paragraph 4. The shipper's certificate required by paragraphs 2 and 3 of this section shall be in the following form, and shall in all cases show a description and the weight of the meat or meat food product:¹

Date.....19..

Name of common carrier

Consignor

Point of shipment

Consignee

Destination

Number of permit

I hereby certify that the following-described meat or meat food products have been inspected and passed according to the Act of Congress of June 30, 1906, and are so marked. It is alleged that the said meat or meat food products are unsound, unhealthful, unwholesome, and unfit for human food.

Kind of product.	Amount and weight.
.....
.....
.....

.....
(Signature of shipper.)
.....
(Business or occupation of shipper.)
.....
(Address of shipper.)

As evidence to connecting carriers that the proper shipper's certificate as required by this paragraph is on file with the initial carrier, the way-bills, transfer bills, running slips, or conductors' cards accompanying the shipments of meat or meat food products, made under paragraphs 2 and 3 of this section, must have embodied in, stamped upon, or attached to the same a signed statement in the following form:

(Name of railroad company.)

Meat or meat product alleged to be unsound, unwholesome, or otherwise unfit for food, as evidenced by shipper's certificate on file with initial carrier.

(Signed), Agent.

¹ Attention is directed to the meat-inspection law, which provides a penalty of a fine of \$10,000 and imprisonment for two years for any person who ships for human consumption in interstate or foreign trade any meat or meat food product which is unsound, unwholesome, or otherwise unfit for human food.

FOR INDUSTRIAL PURPOSES.

Paragraph 5. Uninspected meat or meat food product, or meat or meat food product inspected and marked and which is known to have become unsound, unwholesome, or otherwise unfit for human food, or inedible grease or tallow or other fat, may be shipped from one State or Territory or the District of Columbia to another State or Territory or the District of Columbia or to a foreign country for industrial purposes.

No such shipment shall be accepted by any carrier unless and until the product which is known to be unsound, unwholesome, or otherwise unfit for food shall have been denatured or otherwise rendered unavailable for food purposes. The carrier shall require the shipper to certify in writing that the meat or meat food product has been so denatured or otherwise rendered unavailable for food purposes. This certificate of the shipper that the meat or meat food product has been denatured shall be forwarded by the carrier to the Chief of the Bureau of Animal Industry, Washington, D. C. It is suggested that the shipper's certificate of denaturing required for shipments made under this paragraph be in the following form:

Date.....19..

Name of common carrier

Consignor

Point of shipment

Consignee

Destination

I hereby certify that the following-described inedible meat or meat food products have been denatured or otherwise rendered unavailable for food purposes.

Kind of product.	Amount and weight.
.....
.....
.....

.....
(Signature of shipper.)

.....
(Business or occupation of shipper.)

.....
(Address of shipper.)

As evidence to connecting carriers that the proper shipper's certificate is on file with the initial carrier, the waybills, transfer bills, running slips, or conductors' cards accompanying the shipment of meat or meat food product under this paragraph must have embodied in, stamped upon, or attached to the same a signed statement in the following form:

(Name of railroad company.)

Unsound, unwholesome, or otherwise unfit for food, and denatured or otherwise rendered unavailable for food purposes, as evidenced by shipper's certificate on file with the initial carrier.

(Signed), Agent.

Paragraph 6. When inedible grease, tallow, or other fat for industrial use is of such a nature or is intended for such an industrial use that it is impracticable to denature the same or that denaturing will make it impossible to put the product to the desired industrial use, such inedible grease, tallow, or other fat may be shipped from one State or Territory or the District of Columbia to another State or Territory or the District of Columbia, or to a foreign country, without denaturing if the outside container of the said inedible grease, tallow, or other fat be marked as follows: The end of the containers shall be painted white and conspicuously stenciled or burned with the true name of the product and the word "Inedible."

No such shipment shall be accepted by any carrier unless and until the shipper shall certify in writing that the said inedible grease, tallow, or other fat is of such a character or is intended for such use that denaturing is impossible or will render said inedible grease, tallow, or other fat unavailable for the desired industrial use.

The shipper's certificate shall be in the following form:

Date.....19..

INEDIBLE FAT.

Name of common carrier
 Consignor
 Point of shipment
 Consignee
 Destination

I hereby certify that the following-described fat is inedible and is not intended for food purposes, and that the said fat is of such a character or is intended for such a use that denaturing is impossible or will render said fat unavailable for the desired industrial use.

Kind of product.	Amount and weight.
.....
.....
.....

(Signature of shipper.)

(Business or occupation of shipper.)

(Address of shipper.)

As evidence to connecting carriers that the proper shipper's certificate is on file with the initial carrier, the waybills, transfer bills, running slips, or conductors' cards accompanying such shipments must have embodied in, stamped upon, or attached to the same a signed statement in the following form:

(Name of carrier)

Inedible and not intended for food purposes, as evidenced by shipper's certificate on file with the initial carrier.

(Signed), Agent.

The shipper's certificate will be made in duplicate, and one copy shall be immediately forwarded by the carrier to the Chief of the Bureau of Animal Industry, Washington, D. C.

Regulation 26. Counterfeiting, Etc.

PENALTIES.

SECTION 1. It is a misdemeanor, punishable by fine and imprisonment, for any person, firm, or corporation, or officer, agent, or employee thereof, to forge, counterfeit, simulate or falsely represent or without proper authority to use, fail to use, or detach, or knowingly or wrongfully to alter, deface, or destroy, or to fail to deface or destroy, any of the marks, stamps, tags, labels, or other identification devices provided for by law or by these regulations, on any carcasses, parts of carcasses, or the food product, or the containers thereof or wrongfully to use, deface, or destroy any certificate provided for by law or by these regulations.

Regulation 27. Reports.

OF WORK.

SECTION 1. Reports of the work of inspection carried on in every official establishment shall be forwarded to the Department by the inspector in charge, on such blank forms and in such manner as may be specified by the Chief of the Bureau of Animal Industry.

INFORMATION FROM PROPRIETORS.

SEC. 2. The proprietors of official establishments shall furnish daily to the Department employees detailed to the various departments accurate information regarding receipts, shipments, and amounts of products on which to base their daily reports.

ON SANITATION.

SEC. 3. Reports on sanitation shall be made at stated times by the Department employees in charge of the various departments to the in-

spector in charge of the station, and by the inspector in charge to the Chief of the Bureau of Animal Industry. If any insanitary conditions are detected by any Department employee, such conditions shall be reported immediately to the inspector in charge, who, after investigation, shall report them to the Chief of the Bureau.

Regulation 28. Appeals.

APPEALS.

SECTION 1. When the action of any inspector in condemning any carcass or part thereof, meat, or meat food product is questioned, appeal may be made to the inspector in charge, and from his decision appeal may be made to the Chief of the Bureau of Animal Industry or to the Secretary of Agriculture, whose decision shall be final.

Regulation 29. Cooperation with Municipal Authorities.

MUNICIPAL AUTHORITIES TO BE NOTIFIED.

SECTION 1. Inspectors in charge are directed to notify the municipal authorities of the character of inspection, and upon request to advise with such authorities with a view to preventing the entry into the local markets of diseased animals or their products. The details of any proposed co-operative arrangement must be first submitted to and approved by the Chief of the Bureau of Animal Industry.

APPENDIX N.

THE INSECTICIDE ACT OF 1910.

[This is the Government's Official Pamphlet.]

Issued December 10, 1910.

UNITED STATES DEPARTMENT OF AGRICULTURE,

Office of the Secretary—Circular No. 34.

RULES AND REGULATIONS FOR CARRYING OUT THE PROVISIONS OF THE INSECTICIDE ACT OF 1910.

Including the collection and examination of specimens of Insecticides, Paris Greens, Lead Arsenates, and Fungicides manufactured or offered for sale in the District of Columbia or in any Territory of the United States, or which shall be offered for sale in unbroken packages in any State other than that in which they shall have been respectively manufactured or produced, or which shall be received from any foreign country or intended for shipment to any foreign country, or which may be submitted for examination by the director of the

experiment station of any State, Territory, or the District of Columbia (acting under the direction of the Secretary of Agriculture), or at any domestic or foreign port through which such product is offered for interstate commerce or for export or import between the United States and any foreign port or country.

LETTER OF TRANSMITTAL.

WASHINGTON, D. C., December 8, 1910.

The Secretaries of the Treasury, of Agriculture, and of Commerce and Labor.

SIRS: The committee appointed to represent your several departments in the formulation of uniform rules and regulations for the enforcement of the Insecticide Act of 1910 respectfully submits the attached regulations and recommends their adoption.

GEO. P. McCABE.

R. E. CABELL,

CHAS. EARL.

RULES AND REGULATIONS—GENERAL.

Regulation 1. Original Unbroken Package.

(Sections 2 and 10.)

The term "Original unbroken package," as used in this Act, means the original package as defined by the federal courts with respect to articles of interstate commerce. In general, an original unbroken package is the package delivered by the shipper to the carrier at the initial point of interstate shipment, in the exact condition in which it was shipped, as distinguished from the unit package ordinarily displayed on the shelves of retailers.

Regulation 2. Collection of Samples.

(Section 4.)

(a) Samples shall be collected only by authorized agents of the Department of Agriculture, by the directors of agricultural experiment stations, or by agents of any State, Territory, or the District of Columbia, when commissioned by the Secretary of Agriculture for the purpose.

(b) Samples may be purchased in the open market, and the marks, brands, or tags upon the package, carton, container, wrapper, or accompanying printed or written matter shall be noted. The collector shall also note the names of the vendor and the agent of the vendor who made the sale, together with the date of the purchase. The collector shall purchase representative samples.

(c) A sample taken from bulk goods shall be divided into three parts and each shall be labeled with identifying marks.

(d) If a package be less than four pounds, or in volume less than two quarts, three packages shall be purchased when practicable, and the marks and tags upon each noted as above. When three samples are purchased, or when a sample is taken from bulk goods as in (c) and divided into three parts, one sample or part, as the case may be, shall be delivered to such chemist or examiner as may be designated by the Secretary of Agriculture for analysis or examination; and the other two samples or parts shall be held under seal by the Secretary of Agriculture, who, upon the request of the party against whom prosecution may lie under this Act, on account of the shipment, manufacture, or sale of the product, or the making of a guaranty covering the product, shall deliver one of the samples or parts to such party. Such disposition of the third sample or part shall be made as the Secretary of Agriculture may deem proper.

(e) When it is impracticable to collect three samples or to divide the sample or samples, the order of delivery outlined above shall obtain, and in case there is a second sample, the Secretary of Agriculture may, at his discretion, deliver such sample to the parties interested.

(f) All samples or parts of samples shall be sealed by the collector with a seal provided for that purpose and marked with identifying marks.

Regulation 3. Methods of Analysis.

(Section 4.)

The methods of examination or analysis employed shall be those prescribed by the Secretary of Agriculture.

Regulation 4. Hearings.

(Section 4.)

(a) If, from the examination or analysis, a sample appears to be adulterated or misbranded within the meaning of this Act, notice thereof shall be given to the party from whom such sample was obtained and to such other interested parties as the Secretary of Agriculture may direct, and a date shall be fixed at which such party or parties may be heard before the Secretary of Agriculture or such other person or persons as he may direct. The hearings shall be had at places designated by the Secretary of Agriculture most convenient for all parties concerned. These hearings shall be private and confined to questions of fact. The parties interested therein may appear in person or by attorney and may submit oral or written evidence to show any fault or error in the findings of the analyst or examiner. At the hearing the party cited shall, upon request, be informed of the findings of the analyst or examiner.

(b) If, after hearing held, it still appears that a violation of the Act

has been committed, the Secretary of Agriculture shall, through the Attorney General, inform the United States attorney in whose district the offense appears to have been committed.

(c) Any director of an agricultural experiment station or agent of any State, Territory, or the District of Columbia, duly authorized to cooperate in the enforcement of this Act, who shall obtain satisfactory evidence of any violation of its provisions, shall report the same to the Secretary of Agriculture in order that he may take such steps as are warranted by this report.

Regulation 5. Publication.

(Section 4.)

Publication shall be given of notices of judgment of the courts in cases arising under this Act in the form of such circulars, notices, or bulletins as the Secretary of Agriculture may direct. Publication shall be made not less than thirty days after judgment, and, if an appeal be taken from the judgment of the court before such publication, notice of appeal shall accompany the publication.

Regulation 6. Report of Violations.

(Section 5.)

Requests for institution of prosecutions under Sections 1 and 2 of the Act, and, where practicable for proceedings, under Section 10 of the Act, will be made by the Secretary of Agriculture to the Attorney General. Where immediate action is necessary to secure the seizure of articles under Section 10 and delay will result by reporting the facts to the Attorney General, the Secretary of Agriculture will communicate directly with the United States attorneys. In such cases, however, the Secretary of Agriculture will promptly furnish the Attorney General with a copy of the communication to the United States attorney.

Regulation 7. Report of Violation by State Officials.

(Section 5.)

The directors of experiment stations or agents of any State, Territory, or District of Columbia, designated by the Secretary of Agriculture to investigate offenses under the Act, shall transmit to the Secretary of Agriculture all evidence collected by them relating to violations of Sections 1 and 2 of the Act, and also evidence to sustain proceedings for forfeiture and condemnation of articles under Section 10 of the Act, and such evidence shall be submitted to the solicitor of the Department of Agriculture for examination into its sufficiency to sustain a prosecution.

Regulation 8. Character of Raw Material.

(Section 7.)

The Secretary of Agriculture, when he deems it necessary, shall examine the raw material used in the manufacture of insecticides and fungicides in order to determine whether and under what conditions any of them are harmful to animals or are injurious to vegetation upon which they are intended to be used. From time to time the Secretary of Agriculture will publish in form of circulars or bulletins, as he shall deem adequate, the results of his investigations of the injurious effects of articles used as insecticides and fungicides.

Regulation 9. Abstraction of Valuable Constituents.

(Section 7.)

(a) A valuable constituent of an article is wholly abstracted therefrom, in the contemplation of the Act, whenever the designation of the article imports its presence therein and the constituent has been wholly omitted therefrom in the preparation of the article or has been wholly removed from the completed article.

(b) A valuable constituent of an article is partly abstracted therefrom, in the contemplation of the Act, whenever the designation of the article imports its presence therein and the constituent is not present in the usual or customary amount.

MISBRANDING AND ADULTERATION.**Regulation 10. Definition of Label.**

(Section 8.)

The term label, as used in the Act, includes any legend and descriptive matter or design printed, stenciled, stamped, seared, or impressed upon the article or its container, and also includes circulars, pamphlets, etc., which are packed and go with the articles into the hands of the purchaser, and such letters, circulars, pamphlets, etc., to which reference is made either on the label attached to the package or on the package itself, or any circulars, pamphlets, etc., which accompany the package.

Regulation 11. When Labels Required.

(Section 8.)

Whenever by the terms of the Act, information is required to be on the label of an insecticide or fungicide, such as the statement of percentage of arsenic contained therein, a label must be placed on the article in order that the statement can be made and the omission of a label does not excuse the absence of the required statement.

Regulation 12. Statements on Labels.

(Sections 7 and 8.)

All matter required by the Act to be stated on the label of an article must be plainly and correctly stated on the face of the principal label in type sufficiently clear and in position sufficiently prominent to attract the immediate attention of the purchaser.

Regulation 13. Definition of Package.

(Section 8.)

The term "package," as used in the Act, includes every carton, box, barrel, or other receptacle into which an insecticide or fungicide, Paris green, or lead arsenate is placed for use, handling, removal, shipment, or conveyance, and also a single container of such article or articles or several containers packed together.

Regulation 14. Definition of Insect.

(Section 6.)

The term "insect," as used in the Act and these regulations, is understood to mean any of the numerous small invertebrate animals generally having the body more or less obviously segmented, for the most part belonging to the class Insecta, comprising six-legged, usually winged forms, as beetles, bugs, bees, flies, etc., and to other allied classes of arthropods whose members are wingless and usually have more than six legs, as spiders, mites, ticks, centipedes, wood lice, etc.

Regulation 15. False Statements in Circulars, etc.

(Section 8.)

An insecticide, fungicide, Paris green, or lead arsenate is misbranded under the provisions of the Act if the package containing it is accompanied by any circular, advertising or descriptive matter in or upon which there is any false, deceptive, or misleading statement, design, or device, or if such false, deceptive, or misleading statement, design, or device appears on any letter, circular, design, or descriptive matter to which reference is made on the label attached to the package or in any paper accompanying the package.

Regulation 16. Ingredients Required to be Declared.

(Section 8.)

(a) Insecticides (other than Paris greens and lead arsenates) and fungicides containing arsenic in any of its combinations or in the ele-

mental form must bear a statement on the label showing the total amount of arsenic present (expressed as per centum of metallic arsenic) and also the amount present in water-soluble form (expressed as per centum of metallic arsenic).

(b) Insecticides (other than Paris greens and lead arsenates) and fungicides containing inert substances, which do not prevent, destroy, repel, or mitigate insects or fungi, must bear a statement on the label of the name and percentage of each inert substance therein, unless the name and percentage of each active ingredient of the article is plainly and correctly stated, in which case it will be sufficient to state upon the label that the article contains inert substances, giving the correct percentage thereof.

Regulation 17. False and Misleading Statements on Labels.

(Section 8.)

The use of any false or misleading statement, design, or device appearing on any part of the label shall not be justified by any statement given as the opinion of an expert or other person, nor by any descriptive matter explaining the use of the false or misleading statement, design, or device.

Regulation 18. Name and Address of Manufacturer.

(Section 8.)

(a) The name of the manufacturer or producer or the place of manufacture need not be given upon the label, but if given must be the true name and true place. The words "Packed for * * *," "Distributed by * * *," or some equivalent phrase, shall be added to the label in case the name which appears upon the label is not that of the actual manufacturer or producer.

(b) When a person, firm, or corporation actually manufactures or produces an insecticide, fungicide, Paris green, or lead arsenate in two or more places the actual place of manufacture or production of each particular package need not be stated on the label except when, under the peculiar circumstances of the particular case, the mention of any such place to the exclusion of the others misleads the public.

(c) The use of a geographical name shall not be permitted in connection with an insecticide or fungicide not manufactured or produced in that place, when such name indicates that the article was manufactured or produced in that place.

(d) The use of a geographical name in connection with an insecticide or fungicide will not be deemed a misbranding when, by reason of long usage, it has come to represent a generic term and is used to indicate a style, type, or brand, or where it has come to represent a specific substance rather than the place of manufacture, but in all such cases the

place where any such article is manufactured or produced shall be stated upon the principal label.

(e) A foreign name which is recognized as distinctive of a product of a foreign country shall not be used upon an article of domestic origin except as an indication of the type or style or quality of manufacture, and then only when so qualified that it is not offered for sale under the name of a foreign article.

Regulation 19. Substitution.

(Sections 7 and 8.)

When a substance of a recognized quality commonly used in the preparation of an insecticide or fungicide is replaced in part or in whole by another substance, the name of the substituted substance shall appear upon the label.

FORM OF GUARANTY.

Regulation 20. Guaranty.

(Section 9.)

A general guaranty may be filed with the Secretary of Agriculture by the manufacturer or dealer and be given a serial number, which serial number should appear on every package of goods sold under such guaranty, with the words "Guaranteed by (insert name of guarantor) under the Insecticide Act of 1910." The following form of guaranty is suggested:

I (we), the undersigned, do hereby guarantee that the insecticides, Paris greens, lead arsenates, and fungicides manufactured, packed, distributed, or sold by me (us) (describing the same as fully as possible) are not adulterated or misbranded within the meaning of the Insecticide Act of 1910.

.....
(Signature.)

.....
(Place of business.)

.....
(Date.)

If the guaranty be not filed with the Secretary of Agriculture it should identify and be attached to the bill of lading, invoice, bill of sale, or other schedule giving the description and amount of the article sold.

[Section 10. The provisions of these regulations relating to the collection of samples and hearings before the Secretary of Agriculture or his representative have no application to proceedings instituted under Section 10 of the statute.]

IMPORTATIONS.**Regulation 21. Imports.**

(Section 11.)

All Paris green and lead arsenate imported into the United States will be considered to be intended for use as insecticides and treated accordingly, unless the contrary is shown.

Regulation 22. Imports—Declaration.

(Section 11.)

All invoices of insecticides, Paris greens, lead arsenates, and fungicides imported into the United States shall be accompanied by a declaration of the shipper, made before a United States consular officer, as follows:

I,, the undersigned, do here-
 (Name in full.)
 by declare that I am theof the
 (Manufacturer or shipper.)
 merchandise herein mentioned, which consists of insecticides, Paris greens, lead arsenates, or fungicides. None of this merchandise is falsely labeled in any respect, nor dangerous to the health of the people of the United States, nor forbidden entry into, nor sale in, nor restricted in sale in, the country in which it is made or from which it is exported. The merchandise was manufactured in by
 (Country.) (Name of manufacturer.)
, and is exported from consigned
 (City.)
 to
 (City.)

(Signature.)

Done at this day of 191..

Regulation 23. Imports—Release on Bond.

(Section 11.)

Consignments of insecticides, Paris green, lead arsenates, or fungicides sought to be imported into the United States may be delivered to the consignee before examination to determine whether they are adulterated or misbranded, upon the execution and delivery by the consignee of a penal bond in a sum equivalent to the invoice value of the consignment, including the duty, conditioned upon the prompt return of the consignment to customs custody, upon demand by the Secretary of the Treasury or his representative.

Regulation 24. Imports—Hearing.

(Section 11.)

If upon examination or analysis of a sample from a consignment of insecticides, Paris greens, lead arsenates, or fungicides adulteration or misbranding appear, the owner or consignee shall be promptly notified of the nature of the charge and the time and place at which consideration as to the disposition of the consignment will take place, in order that he may appear and introduce evidence.

Regulation 25. Imports—Detention.

(Section 11.)

A reasonable time will be allowed the owner or consignee to secure evidence for consideration in connection with charges of misbranding or adulteration. If after examination or analysis of a sample from a consignment of insecticides, Paris greens, lead arsenates, or fungicides, such sample has been found not to comply with the provisions of the Act and, after a hearing granted to the owner or consignee of the goods shall have been held, all the evidence in the case, including the sample, shall be transmitted to such official stationed in Washington as the Secretary of Agriculture may designate for examination or analysis. If it then appears that the consignment may not lawfully be imported into the United States in consideration of the results of the analysis or examination of the said sample, the Secretary of Agriculture shall report to the Secretary of the Treasury that the particular importation is adulterated or misbranded, as the case may be, under the provisions of the Insecticide Act of 1910.

REVIEW, AMENDMENT, AND ENFORCEMENT OF REGULATIONS.**Regulation 26. Review.**

(Section 11.)

Application for review of decisions regarding the adulteration or misbranding of insecticides, Paris greens, lead arsenates, or fungicides shall be addressed to the Secretary of Agriculture, and all vouchers for reimbursement for samples should be addressed to such officer of the Department of Agriculture as the Secretary of Agriculture may direct.

Regulation 27. Amendment of Regulations.

These regulations may be amended at any time without notice, with the concurrence of the Secretary of the Treasury, the Secretary of Agriculture, and the Secretary of Commerce and Labor.

Regulation 28. Enforcement of Regulations.

Regulation 12 will not be enforced until January 1, 1912. Prior to that time all matter required by the Act to be stated on the label may be added to the principal label in type sufficiently clear to attract the immediate attention of the purchaser by means of a sticker or paster or supplemental label in such a way as not to render the principal label deceptive or misleading. (As amended July 13, 1911.)

FRANKLIN MACVEAGH,
Secretary of the Treasury.

JAMES WILSON,
Secretary of Agriculture.

CHARLES NAGEL,
Secretary of Commerce and Labor.

WASHINGTON, D. C., December 9, 1910.

STATUTE.

An Act for preventing the manufacture, sale, or transportation of adulterated or misbranded Paris greens, lead arsenates, and other insecticides, and also fungicides, and for regulating traffic therein, and for other purposes. (36 Stat., 331.)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That it shall be unlawful for any person to manufacture within any Territory or the District of Columbia any insecticide, Paris green, lead arsenate, or fungicide which is adulterated or misbranded within the meaning of this Act; and any person who shall violate any of the provisions of this section shall be guilty of a misdemeanor, and shall, upon conviction thereof, be fined not to exceed two hundred dollars for the first offense, and upon conviction for each subsequent offense be fined not to exceed three hundred dollars, or sentenced to imprisonment for not to exceed one year, or both such fine and imprisonment, in the discretion of the court.

SEC. 2. That the introduction into any State or Territory or the District of Columbia from any other State or Territory or the District of Columbia, or from any foreign country, or shipment to any foreign country, of any insecticide, or Paris green, or lead arsenate, or fungicide which is adulterated or misbranded within the meaning of this Act is hereby prohibited; and any person who shall ship or deliver for shipment from any State or Territory or the District of Columbia to any other State or Territory or the District of Columbia, or to any foreign country, or who shall receive in any State or Territory or the District of Columbia from any other State or Territory or the District of Columbia, or foreign country, and having so received, shall deliver, in original unbroken packages, for pay or otherwise, or offer to deliver, to any other person, any such article so adulterated or misbranded within the meaning of this Act, or any per-

son who shall sell or offer for sale in the District of Columbia or any Territory of the United States and such adulterated or misbranded insecticide, or Paris green, or lead arsenate, or fungicide, or export or offer to export the same to any foreign country, shall be guilty of a misdemeanor, and for such offense be fined not exceeding two hundred dollars for the first offense, and upon conviction for each subsequent offense not exceeding three hundred dollars, or be imprisoned not exceeding one year, or both, in the discretion of the court: *Provided*, That no article shall be deemed misbranded or adulterated within the provisions of this Act when intended for export to any foreign country and prepared or packed according to the specifications or directions of the foreign purchaser; but if said articles shall be in fact sold or offered for sale for domestic use or consumption, then this proviso shall not exempt said article from the operation of any of the other provisions of this Act.

SEC. 3. That the Secretary of the Treasury, the Secretary of Agriculture, and the Secretary of Commerce and Labor shall make uniform rules and regulations for carrying out the provisions of this Act, including the collection and examination of specimens of insecticides, Paris greens, lead arsenates, and fungicides manufactured or offered for sale in the District of Columbia or in any Territory of the United States, or which shall be offered for sale in unbroken packages in any State other than that in which they shall have been respectively manufactured or produced, or which shall be received from any foreign country or intended for shipment to any foreign country, or which may be submitted for examination by the director of the experiment station of any State, Territory, or the District of Columbia (acting under the direction of the Secretary of Agriculture), or at any domestic or foreign port through which such product is offered for interstate commerce, or for export or import between the United States and any foreign port or country.

SEC. 4. That the examination of specimens of insecticides, Paris greens, lead arsenates, and fungicides shall be made in the Department of Agriculture, by such existing bureau or bureaus as may be directed by the Secretary, for the purpose of determining from such examination whether such articles are adulterated or misbranded within the meaning of this Act; and if it shall appear from any such examination that any of such specimens are adulterated or misbranded within the meaning of this Act, the Secretary of Agriculture shall cause notice thereof to be given to the party from whom such sample was obtained. Any party so notified shall be given an opportunity to be heard, under such rules and regulations as may be prescribed as aforesaid, and if it appears that any of the provisions of this Act have been violated by such party, then the Secretary of Agriculture shall at once certify the facts to the proper United States district attorney, with a copy of the results of the analysis or the examination of such article duly authenticated by the analyst or officer making such examination, under the oath of such officer. After

judgment of the court, notice shall be given by publication in such manner as may be prescribed by the rules and regulations aforesaid.

SEC. 5. That it shall be the duty of each district attorney to whom the Secretary of Agriculture shall report any violation of this Act, or to whom any director of experiment station or agent of any State, Territory, or the District of Columbia, under authority of the Secretary of Agriculture, shall present satisfactory evidences of any such violation, to cause appropriate proceedings to be commenced and prosecuted in the proper courts of the United States, without delay, for the enforcement of the penalties as in such case herein provided.

SEC. 6. That the term "insecticide" as used in this Act shall include any substance or mixture of substances intended to be used for preventing, destroying, repelling, or mitigating any insects which may infest vegetation, man or other animals, or households, or be present in any environment whatsoever. The term "Paris green" as used in this Act shall include the product sold in commerce as Paris green and chemically known as the aceto-arsenite of copper. The term "lead arsenate" as used in this Act shall include the product or products sold in commerce as lead arsenate and consisting chemically of products derived from arsenic acid (H_3AsO_4) by replacing one or more hydrogen atoms by lead. That the term "fungicide" as used in this Act shall include any substance or mixture of substances intended to be used for preventing, destroying, repelling, or mitigating any and all fungi that may infest vegetation or be present in any environment whatsoever.

SEC. 7. That for the purpose of this Act an article shall be deemed to be adulterated—

In the case of Paris green: First, if it does not contain at least fifty per centum of arsenious oxide; second, if it contains arsenic in water-soluble forms equivalent to more than three and one-half per centum of arsenious oxide; third, if any substance has been mixed and packed with it so as to reduce or lower or injuriously affect its quality or strength.

In the case of lead arsenate: First, if it contains more than fifty per centum of water; second, if it contains total arsenic equivalent to less than twelve and one-half per centum of arsenic oxide (As_2O_5); third, if it contains arsenic in water-soluble forms equivalent to more than seventy-five one hundredths per centum of arsenic oxide (As_2O_5); fourth, if any substances have been mixed and packed with it so as to reduce, lower, or injuriously affect its quality or strength: *Provided, however,* That extra water may be added to lead arsenate (as described in this paragraph) if the resulting mixture is labeled lead arsenate and water, the percentage of extra water being plainly and correctly stated on the label.

In the case of insecticides or fungicides, other than Paris green and lead arsenate: First, if its strength or purity fall below the professed standard or quality under which it is sold; second, if any substance has been substituted wholly or in part for the article; third, if any valuable

constituent of the article has been wholly or in part abstracted; fourth, if it is intended for use on vegetation and shall contain any substance or substances which, although preventing, destroying, repelling, or mitigating insects, shall be injurious to such vegetation when used.

SEC. 8. That the term "misbranded" as used herein shall apply to all insecticides, Paris greens, lead arsenates, or fungicides, or articles which enter into the composition of insecticides or fungicides, the package or label of which shall bear any statement, design, or device regarding such article or the ingredients or substances contained therein which shall be false or misleading in any particular, and to all insecticides, Paris greens, lead arsenates, or fungicides which are falsely branded as to the State, Territory, or country in which they are manufactured or produced.

That for the purpose of this Act an article shall be deemed to be misbranded—

In the case of insecticides, Paris greens, lead arsenates, and fungicides: First, if it be an imitation or offered for sale under the name of another article; second, if it be labeled or branded so as to deceive or mislead the purchaser, or if the contents of the package as originally put up shall have been removed in whole or in part and other contents shall have been placed in such package; third, if in package form, and the contents are stated in terms of weight or measure, they are not plainly and correctly stated on the outside of the package.

In the case of insecticides (other than Paris greens and lead arsenates) and fungicides: First, if it contains arsenic in any of its combinations or in the elemental form and the total amount of arsenic present (expressed as per centum of metallic arsenic) is not stated on the label; second, if it contains arsenic in any of its combinations or in the elemental form and the amount of arsenic in water-soluble forms (expressed as per centum of metallic arsenic) is not stated on the label; third, if it consists partially or completely of an inert substance or substances which do not prevent, destroy, repel, or mitigate insects or fungi and does not have the names and percentage amounts of each and every one of such inert ingredients plainly and correctly stated on the label: *Provided, however,* That in lieu of naming and stating the percentage amount of each and every inert ingredient the producer may at his discretion state plainly upon the label the correct names and percentage amounts of each and every ingredient of the insecticide or fungicide having insecticidal or fungicidal properties, and make no mention of the inert ingredients, except in so far as to state the total percentage of inert ingredients present.

SEC. 9. That no dealer shall be prosecuted under the provisions of this Act when he can establish a guaranty signed by the wholesaler, jobber, manufacturer, or other party residing in the United States, from whom he purchased such articles, to the effect that the same is not adulterated or misbranded within the meaning of this Act, designating it.

Said guaranty, to afford protection, shall contain the name and address of the party or parties making the sale of such articles to such dealer, and in such case said party or parties shall be amenable to the prosecutions, fines, and other penalties which would attach in due course to the dealer under the provisions of this Act.

SEC. 10. That any insecticide, Paris green, lead arsenate, or fungicide that is adulterated or misbranded within the meaning of this Act and is being transported from one State, Territory, or District, to another for sale, or, having been transported, remains unloaded, unsold, or in original unbroken packages or if it be sold or offered for sale in the District of Columbia or any Territory of the United States or if it be imported from a foreign country for sale, shall be liable to be proceeded against in any district court of the United States within the district wherein the same is found and seized for confiscation by a process of libel for condemnation.

And if such article is condemned as being adulterated or misbranded, within the meaning of this Act, the same shall be disposed of by destruction or sale as the said court may direct, and the proceeds thereof, if sold, less the legal costs and charges, shall be paid into the Treasury of the United States, but such goods shall not be sold in any jurisdiction contrary to the provisions of this Act or the laws of that jurisdiction: *Provided, however,* That upon the payment of the costs of such libel proceedings and the execution and delivery of a good and sufficient bond to the effect that such articles shall not be sold or otherwise disposed of contrary to the provisions of this Act or the laws of any State, Territory, or District, the court may by order direct that such articles be delivered to the owner thereof. The proceedings of such libel cases shall conform, as near as may be, to the proceedings in admiralty, except that either party may demand trial by jury of any issue of fact joined in any such case, and all such proceedings shall be at the suit of and in the name of the United States.

SEC. 11. That the Secretary of the Treasury shall deliver to the Secretary of Agriculture, upon his request, from time to time, samples of insecticides, Paris greens, lead arsenates, and fungicides which are being imported into the United States or offered for import, giving notice thereof to the owner or consignee, who may appear before the Secretary of Agriculture and have the right to introduce testimony; and if it appear from the examination of such samples that any insecticide, or Paris green, or lead arsenate, or fungicide offered to be imported into the United States is adulterated or misbranded within the meaning of this Act, or is otherwise dangerous to the health of the people of the United States, or is of a kind forbidden entry into or forbidden to be sold or restricted in sale in the country in which it is made or from which it is exported, or is otherwise falsely labeled in any respect, the said article shall be refused admission, and the Secretary of the Treasury shall refuse delivery to the consignee and shall cause the destruction of any

good refused delivery which shall not be exported by the consignee within three months from the date of notice of such refusal under such regulations as the Secretary of the Treasury may prescribe: *Provided*, That the Secretary of the Treasury may deliver to the consignee such goods pending examination and decision in the matter on execution of a penal bond for the amount of the full invoice value of such goods, together with the duty thereon, and on refusal to return such goods for any cause to the custody of the Secretary of the Treasury, when demanded, for the purpose of excluding them from the country, or for any other purpose, said consignee shall forfeit the full amount of the bond: *And provided further*, That all charges for storage, cartage, and labor on goods which are refused admission or delivery shall be paid by the owner or consignee, and in default of such payment shall constitute a lien against any future importation made by such owner or consignee.

SEC. 12. That the term "Territory," as used in this Act, shall include the District of Alaska and the insular possessions of the United States. The word "person," as used in this Act, shall be construed to impart both the plural and the singular, as the case demands, and shall include corporations, companies, societies, and associations. When construing and enforcing the provisions of this Act, the act, omission, or failure of any officer, agent, or other person acting for or employed by any corporation, company, society, or association, within the scope of his employment or office, shall in every case be also deemed to be the act, omission, or failure of such corporation, company, society, or association, as well as that of the other person.

SEC. 13. That this Act shall be known and referred to as "The Insecticide Act of 1910."

SEC. 14. That this Act shall be in force and effect from and after the first day of January, nineteen hundred and eleven.

Approved, April 26, 1910.

Issued August 26, 1911.

UNITED STATES DEPARTMENT OF AGRICULTURE.

Office of the Secretary.

INSECTICIDE DECISION NO. 1.

Insect Powder.

Many requests have been received from manufacturers and dealers for a decision giving the position of the department regarding the use of "insect flower stems" in preparations designated "Insect powder." A decision upon this point must necessarily depend in great measure upon the meaning of the term "insect powder."

There are a number of powdered substances on the market which are widely used as insecticides. As examples there may be mentioned pow-

dered hellebore, powdered tobacco, and the powdered flowers of certain species of chrysanthemum. At first thought it would seem that the term "insect powder" might properly be applied to all of these as well as to any other powder which possesses insecticidal properties. A study of the subject, however, has convinced the board that such a broad and indefinite application of the term is not justifiable because common usage and trade practice have resulted in a limitation of the term so that, standing alone, it now signifies one definite thing, namely, the powdered flowered heads of certain species of chrysanthemum. The reasons which have led us to this conclusion are briefly as follows: The popular and scientific works of reference are in substantial agreement in declaring that "insect powder" commonly signifies the powdered flower heads of certain species of chrysanthemum. Inquiries made by the board have developed the fact that among manufacturers and dealers generally the term "insect powder" is held to signify the powdered flowers of certain species of chrysanthemum (*pyrethrum*). Furthermore, the board has evidence from expert scientists supporting this position completely.

The board holds that the term "insect powder" is used in both a generic and a specific sense, the former applying in cases where no attempt is made to designate a particular article. A similar condition exists in the use of the word "flour." There may be rye flour and rice flour, but the word "flour," standing alone and used to designate a specific article, means "wheat flour." Similarly, there may be hellebore insect powder and tobacco insect powder, but the term "insect powder" used without qualification signifies a definite article, as follows:

The term "insect powder," when used without qualification, means an insecticide made from the powdered flower heads of the following species of chrysanthemum:

1. *Chrysanthemum (pyrethrum) cinerariaefolium* (Trev.) Bocc.
2. *Chrysanthemum (pyrethrum) roseum* Web. & Mohr.
3. *Chrysanthemum marshallii* Aschers. (Synonym: *Pyrethrum carneum* M. B.)

It naturally follows, from this interpretation, that the term "insect powder," unqualified, can not properly be applied to an article which consists in whole or in part of insect flower stems. The use of powdered stems under such conditions would constitute an adulteration under the law. (Sec. 7: "That for the purpose of this Act an article shall be deemed to be adulterated * * *. In the case of insecticides or fungicides, other than Paris green and lead arsenate: First, if its strength or purity fall below the professed standard or quality under which it is sold; second, if any substance has been substituted wholly or in part for the article.")

In designating a mixture of powdered flowers and stems the term "insect powder" may be used, provided this is immediately qualified by

word or phrase so as to indicate clearly the nature of the article. The qualifying word or phrase should appear in type sufficiently clear and in position sufficiently prominent to attract the immediate attention of the purchaser. In a case of this kind, where the constituent substances are named, the predominating substance should be named first in order.

The principles laid down above governing the use of the term "insect powder," when applied to substances consisting in whole or in part of powdered stems, are to be applied in like manner to all powdered substances intended to be used as insecticides.

The department has been requested to decide whether powdered insect flower stems will be regarded as "inert ingredients" under the terms of the Insecticide Act. Investigations to determine the precise value of these powdered stems are now under way. From the information at hand at the present time it appears that powdered stems have a certain insecticidal value though distinctly less than the powdered flower heads. In view of this fact the declaration of powdered stems as inert ingredients will not be required unless further investigation shows this position to be erroneous, in which event suitable notice will be given to the trade.

The terms "Pyrethrum" and "Pyrethrum powder" are, when applied to insecticides, synonymous with "Insect powder."

M. DORSET,
M. B. WAITE,
A. L. QUAINANCE,
J. K. HAYWOOD,

Insecticide and Fungicide Board.

Approved:

JAMES WILSON,

Secretary of Agriculture.

WASHINGTON, D. C., July 15, 1911.

APPENDIX O.**STANDARDS OF PURITY FOR FOOD PRODUCTS.**

[Note.—This is the official pamphlet of the Department of Agriculture.]

Circular No. 19, Superseding Circulars Nos. 13 and 17.

SUPPLEMENTAL PROCLAMATION.

Referring to Circular No. 13 of this office, dated December 20, 1904, and to Circular No. 17 of this office, dated March 8, 1906, the following food standards are hereby established as superseding and supplemental to those proclaimed on the dates above named.

JAMES WILSON,
Secretary of Agriculture.

WASHINGTON, D. C., June 26, 1906.

LETTER OF SUBMITTAL.

The Honorable the Secretary of Agriculture.

Sir: The undersigned, representing the Association of Official Agricultural Chemists of the United States and the Interstate Food Commission, and commissioned by you, under authority given by the Act of Congress approved March 3, 1903, to collaborate with you "to establish standards of purity for food products and to determine what are regarded as adulterations therein," respectfully report that they have carefully reviewed, in the light of recent investigations and correspondence, the standards earlier recommended by them, and have prepared a set of amended schedules, in which certain changes have been introduced for the purpose of securing increased accuracy of expression and a more perfect correspondence of the chemical limits to the normal materials designated, and from which standards previously proclaimed for several manufactured articles have been omitted because of the unsatisfactory condition of trade nomenclature as applied thereto; and also additional schedules of standards for ice creams, vegetables and vegetable products, tea and coffee. They respectfully recommend that the standards herewith submitted be approved and proclaimed as the established standards, superseding and supplementing those established on December 20, 1904, and March 8, 1906.

The principles that have guided us in the formulation of these standards are appended hereto.

The several schedules of additional standards recommended have been submitted in a tentative form, to the manufacturing firms and the

trade immediately interested, and also to the State food-control officials for criticism.

Respectfully,

WILLIAM FREAR,
EDWARD H. JENKINS,
M. A. SCOVELL,
H. A. WEBER,
H. W. WILEY,

Committee on Food Standards,
Association of Official Agricultural Chemists.
RICHARD FISCHER,

Representing the Interstate Food Commission.

WASHINGTON, D. C., June 26, 1906.

PRINCIPLES ON WHICH THE STANDARDS ARE BASED.

The general considerations which have guided the committee in preparing the standards for food products are the following:

1. The standards are expressed in the form of definitions, with or without accompanying specifications of limit in composition.
2. The main classes of food articles are defined before the subordinate classes are considered.
3. The definitions are so framed as to exclude from the articles defined substances not included in the definitions.
4. The definitions include, where possible, those qualities which make the articles described wholesome for human food.
5. A term defined in any of the several schedules has the same meaning wherever else it is used in this report.
6. The names of food products herein defined usually agree with existing American trade or manufacturing usage; but where such usage is not clearly established or where trade names confuse two or more articles for which specific designations are desirable, preference is given to one of the several trade names applied.
7. Standards are based upon data representing materials produced under American conditions and manufactured by American processes or representing such varieties of foreign articles as are chiefly imported for American use.
8. The standards fixed are such that a departure of the articles to which they apply, above the maximum or below the minimum limit prescribed, is evidence that such articles are of inferior or abnormal quality.
9. The limits fixed as standard are not necessarily the extremes authentically recorded for the article in question, because such extremes are commonly due to abnormal conditions of production, and are usually accompanied by marks of inferiority or abnormality readily perceived by the producer or manufacturer.

FOOD STANDARDS.

I. ANIMAL PRODUCTS.

A. MEATS AND THE PRINCIPAL MEAT PRODUCTS.

a. Meats.

1. *Meat, flesh*, is any clean, sound, dressed and properly prepared edible part of animals in good health at the time of slaughter, and if it bears a name descriptive of its kind, composition or origin, it corresponds thereto. The term "animals," as herein used, includes not only mammals, but fish, fowl, crustaceans, mollusks and all other animals used as food.

2. *Fresh meat* is meat from animals recently slaughtered and properly cooled until delivered to the consumer.

3. *Cold storage meat* is meat from animals recently slaughtered and preserved by refrigeration until delivered to the consumer.¹

4. *Salted, pickled and smoked meats* are unmixed meats preserved by salt, sugar, vinegar, spices or smoke, singly or in combination, whether in bulk or in suitable containers.²

b. Manufactured Meats.

1. *Manufactured meats* are meats not included in paragraphs 2, 3 and 4, whether simple or mixed, whole or comminuted, in bulk or in suitable containers,² with or without the addition of salt, sugar, vinegar,

¹ The establishment of proper periods of time for cold storage is reserved for future consideration when the investigations on this subject, authorized by Congress, are completed.

² Suitable containers for keeping moist food products, such as sirups, honey, condensed milk, soups, meat extracts, meats, manufactured meats, and undried fruits and vegetables, and wrappers in contact with food products, contain on their surfaces, in contact with the food product, no lead, antimony, arsenic, zinc or copper or any compounds thereof or any other poisonous or injurious substance. If the containers are made of tin plate they are outside-soldered, and the plate in no place contains less than one hundred and thirteen (113) milligrams of tin on a piece five (5) centimeters square or one and eighth (1.8) grains on a piece two (2) inches square.

The inner coating of the containers is free from pin-holes, blisters and cracks.

If the tin plate is lacquered, the lacquer completely covers the tinned surface within the container and yields to the contents of the container no lead, antimony, arsenic, zinc or copper or any compounds thereof, or any other poisonous or injurious substance.

spices, smoke, oils or rendered fat. If they bear names descriptive of kind, composition or origin, they correspond thereto, and when bearing such descriptive names, if force or flavoring meats are used, the kind and quantity thereof are made known.

c. Meat Extracts, Meat Peptones, etc.

(Schedule in preparation.)

d. Lard.

1. *Lard* is the rendered fresh fat from hogs in good health at the time of slaughter, is clean, free from rancidity, and contains, necessarily incorporated in the process of rendering, not more than one (1) percent of substances other than fatty acids and fat.

2. *Leaf lard* is lard rendered at moderately high temperatures from the internal fat of the abdomen of the hog, excluding that adherent to the intestines, and has an iodine number not greater than sixty (60).

3. *Neutral lard* is lard rendered at low temperatures.

B. MILK AND ITS PRODUCTS.

a. Milks.

1. *Milk* is the fresh, clean, lacteal secretion obtained by the complete milking of one or more healthy cows, properly fed and kept, excluding that obtained within fifteen days before and ten days after calving, and contains not less than eight and one-half (8.5) percent of solids not fat, and not less than three and one-quarter (3.25) percent of milk fat.

2. *Blended milk* is milk modified in its composition so as to have a definite and stated percentage of one or more of its constituents.

3. *Skim milk* is milk from which a part or all of the cream has been removed and contains not less than nine and one-quarter (9.25) percent of milk solids.

4. *Pasteurized milk* is milk that has been heated below boiling but sufficiently to kill most of the active organisms present, and immediately cooled to 50° Fahr. or lower.

5. *Sterilized milk* is milk that has been heated at the temperature of boiling water or higher for a length of time sufficient to kill all organisms present.

6. *Condensed milk, evaporated milk*, is milk from which a considerable portion of water has been evaporated and contains not less than twenty-eight (28) percent of milk solids, of which not less than twenty-seven and five-tenths (27.5) percent is milk fat.

7. *Sweetened condensed milk* is milk from which a considerable portion of water has been evaporated and to which sugar (sucrose) has

been added, and contains not less than twenty-eight (28) percent of milk solids, of which not less than twenty-seven and five-tenths (27.5) percent is milk fat.

8. *Condensed skim milk* is skim milk from which a considerable portion of water has been evaporated.

9. *Buttermilk* is the product that remains when butter is removed from milk or cream in the process of churning.

10. *Goat's milk, ewe's milk, et cetera*, are the fresh, clean, lacteal secretions, free from colostrum, obtained by the complete milking of healthy animals other than cows, properly fed and kept, and conform in name to the species of animal from which they are obtained.

b. Cream.

1. *Cream* is that portion of milk, rich in milk fat, which rises to the surface of milk on standing, or is separated from it by centrifugal force, is fresh and clean, and contains not less than eighteen (18) percent of milk fat.

2. *Evaporated cream, clotted cream*, is cream from which a considerable portion of water has been evaporated.

c. Milk Fat or Butter Fat.

1. *Milk fat, butter fat*, is the fat of milk, and has a Reichert-Meissl number not less than twenty-four (24) and a specific gravity not less than 0.905 $\left(\frac{40^{\circ} \text{ C.}}{40^{\circ} \text{ C.}}\right)$

d. Butter.

1. *Butter* is the clean, non-rancid product made by gathering in any manner the fat of fresh or ripened milk or cream into a mass, which also contains a small portion of the other milk constituents, with or without salt, and contains not less than eighty-two and five-tenths (82.5) percent of milk fat. By Acts of Congress approved August 2, 1886, and May 9, 1902, butter may also contain added coloring matter.

2. *Renovated butter, process butter*, is the product made by melting butter and reworking, without the addition or use of chemicals or any substances except milk, cream or salt, and contains not more than sixteen (16) percent of water and at least eighty-two and five-tenths (82.5) percent of milk fat.

e. Cheese.

1. *Cheese* is the sound, solid and ripened product made from milk or cream by coagulating the casein thereof with rennet or lactic acid,

with or without the addition of ripening ferments and seasoning, and contains, in the water-free substance, not less than fifty (50) percent of milk fat. By Act of Congress approved June 6, 1896, cheese may also contain added coloring matter.

2. *Skim milk cheese* is the sound, solid and ripened product, made from skim milk by coagulating the casein thereof with rennet or lactic acid, with or without the addition of ripening ferments and seasoning.

3. *Goat's milk cheese, ewe's milk cheese, et cetera*, are the sound, ripened products made from the milks of the animals specified, by coagulating the casein thereof with rennet or lactic acid, with or without the addition of ripening ferments and seasoning.

f. Ice Creams.

1. *Ice cream* is a frozen product made from cream and sugar, with or without a natural flavoring, and contains not less than fourteen (14) percent of milk fat.

2. *Fruit ice cream* is a frozen product made from cream, sugar and sound, clean, mature fruits, and contains not less than twelve (12) percent of milk fat.

3. *Nut ice cream* is a frozen product made from cream, sugar and sound, non-rancid nuts, and contains not less than twelve (12) percent of milk fat.

g. Miscellaneous Milk Products.

1. *Whey* is the product remaining after the removal of fat and casein from milk in the process of cheese-making.

2. *Kumiss* is the product made by the alcoholic fermentation of mare's or cow's milk.

II. VEGETABLE PRODUCTS.

A. GRAIN PRODUCTS.

a. Grains and Meals.

1. *Grain* is the fully matured, clean, sound, air-dry seed of wheat, maize, rice, oats, rye, buckwheat, barley, sorghum, millet or spelt.

2. *Meal* is the clean, sound product made by grinding grain.

3. *Flour* is the fine, clean, sound product made by bolting wheat meal, and contains not more than thirteen and one-half (13.5) percent of moisture, not less than one and twenty-five hundredths (1.25) percent of nitrogen, not more than one (1) percent of ash, and not more than fifty hundredths (0.50) percent of fiber.

4. *Graham flour* is unbolted wheat meal.

5. *Gluten flour* is the clean, sound product made from flour by the

removal of starch, and contains not less than five and six-tenths (5.6) percent of nitrogen and not more than ten (10) percent of moisture.

6. *Maize meal, corn meal, Indian corn meal*, is meal made from sound maize grain, and contains not more than fourteen (14) percent of moisture, not less than one and twelve hundredths (1.12) percent of nitrogen, and not more than one and six-tenths (1.6) percent of ash.

7. *Rice* is the hulled, or hulled and polished grain of *Oryza sativa*.

8. *Oatmeal* is meal made from hulled oats and contains not more than twelve (12) percent of moisture, not more than one and five-tenths (1.5) percent of crude fiber, not less than two and twenty-four hundredths (2.24) percent of nitrogen, and not more than two and two-tenths (2.2) percent of ash.

9. *Rye flour* is the fine, clean, sound product made by bolting rye meal, and contains not more than thirteen and one-half (13.5) percent of moisture, not less than one and thirty-six hundredths (1.36) percent of nitrogen, and not more than one and twenty-five hundredths (1.25) percent of ash.

10. *Buckwheat flour* is bolted buckwheat meal and contains not more than twelve (12) percent of moisture, not less than one and twenty-eight hundredths (1.28) percent of nitrogen, and not more than one and seventy-five hundredths (1.75) percent of ash.

B. FRUITS AND VEGETABLES.

a. Fruit and Fruit Products.

(Except fruit juices, fresh, sweet and fermented, and vinegars.)

1. *Fruits* are the clean, sound, edible, fleshy fructifications of plants, distinguished by their sweet, acid and ethereal flavors.

2. *Dried fruit*¹ is the clean, sound product made by drying mature, properly prepared, fresh fruit in such a way as to take up no harmful substance, and conforms in name to the fruit used in its preparation; *sun-dried fruit* is dried fruit made by drying without the use of artificial means; *evaporated fruit* is dried fruit made by drying with the use of artificial means.

3. *Evaporated apples* are evaporated fruit made from peeled and cored apples, and contain not more than twenty-seven (27) percent of moisture, determined by the usual commercial method of drying for four (4) hours at the temperature of boiling water.

(Standards for other dried fruits are in preparation.)

4. *Canned fruit* is the sound product made by sterilizing clean,

¹ The subject of sulphurous acid in dried fruits is reserved for consideration in connection with the schedule "Preservatives and Coloring Matters."

sound, properly matured and prepared fresh fruit, by heating, with or without sugar (sucrose) and spices, and keeping in suitable, clean, hermetically sealed containers, and conforms in name to the fruit used in its preparation.

5. *Preserve*² is the sound product made from clean, sound, properly matured and prepared fresh fruit and sugar (sucrose) sirup, with or without spices or vinegar, and conforms in name to that of the fruit used, and in its preparation not less than forty-five (45) pounds of fruit are used to each fifty-five (55) pounds of sugar.

6. *Honey preserve*² is preserve in which honey is used in place of sugar (sucrose) sirup.

7. *Glucose preserve*² is preserve in which a glucose product is used in place of sugar (sucrose) sirup.

8. *Jam, marmalade*,² is the sound product made from clean, sound, properly matured and prepared fresh fruit and sugar (sucrose), with or without spices or vinegar, by boiling to a pulpy or semisolid consistence, and conforms in name to the fruit used, and in its preparation not less than forty-five (45) pounds of fruit are used to each fifty-five (55) pounds of sugar.

9. *Glucose jam, glucose marmalade*,² is jam in which a glucose product is used in place of sugar (sucrose).

10. *Fruit butter*² is the sound product made from fruit juice and clean, sound, properly matured and prepared fruit, evaporated to a semisolid mass of homogenous consistence, with or without the addition of sugar and spices or vinegar, and conforms in name to the fruit used in its preparation.

11. *Glucose fruit butter*² is fruit butter in which a glucose product is used in place of sugar (sucrose).

12. *Jelly*² is the sound, semisolid, gelatinous product made by boiling clean, sound, properly matured and prepared fresh fruit with water, concentrating the expressed and strained juice, to which sugar (sucrose) is added, and conforms in name to the fruit used in its preparation.

13. *Glucose jelly*² is jelly in which a glucose product is used in place of sugar (sucrose).

b. *Vegetables and Vegetable Products.*

1. *Vegetables* are the succulent, clean, sound, edible parts of herbaceous plants used for culinary purposes.

2. *Dried vegetables* are the clean, sound products made by drying properly matured and prepared vegetables in such a way as to take up no harmful substance, and conform in name to the vegetables used

² Products made with mixtures of sugar, glucose and honey, or any two thereof, are reserved for future consideration.

in their preparation; *sun-dried vegetables* are dried vegetables made by drying without the use of artificial means; *evaporated vegetables* are dried vegetables made by drying with the use of artificial means.

3. *Canned vegetables* are sound, properly matured and prepared fresh vegetables, with or without salt, sterilized by heat, with or without previous cooking in vessels from which they take up no metallic substance, kept in suitable, clean, hermetically sealed containers, are sound and conform in name to the vegetables used in their preparation.

4. *Pickles* are clean, sound, immature cucumbers, properly prepared, without taking up any metallic compound other than salt, and preserved in any kind of vinegar, with or without spices; *pickled onions*, *pickled beets*, *pickled beans*, and other pickled vegetables are vegetables prepared as described above, and conform in name to the vegetables used.

5. *Salt pickles* are clean, sound, immature cucumbers, preserved in a solution of common salt, with or without spices.

6. *Sweet pickles* are pickled cucumbers or other vegetables in the preparation of which sugar (sucrose) is used.

7. *Sauerkraut* is clean, sound, properly prepared cabbage, mixed with salt, and subjected to fermentation.

8. *Catchup* (*ketchup*, *catsup*) is the clean, sound product made from the properly prepared pulp of clean, sound, fresh, ripe tomatoes, with spices and with or without sugar and vinegar; *mushroom catchup*, *walnut catchup*, *et cetera*, are catchups made as above described, and conform in name to the substances used in their preparation.

C. SUGARS AND RELATED SUBSTANCES.

a. Sugar and Sugar Products.

Sugar.

1. *Sugar* is the product chemically known as sucrose (saccharose), chiefly obtained from sugar cane, sugar beets, sorghum, maple and palm.

2. *Granulated*, *loaf*, *cut*, *milled* and *powdered sugars* are different forms of sugar and contain at least ninety-nine and five-tenths (99.5) percent of sucrose.

3. *Maple sugar* is the solid product resulting from the evaporation of maple sap, and contains, in the water-free substance, not less than sixty-five one-hundredths (0.65) percent of maple sugar ash.

4. *Massecurite*, *melada*, *mush sugar*, and *concrete* are products made by evaporating the purified juice of a sugar-producing plant, or a solution of sugar, to a solid or semisolid consistence, and in which the sugar chiefly exists in a crystalline state.

Molasses and Refiners' Sirup.

1. *Molasses* is the product left after separating the sugar from massecuite, melada, mush sugar or concrete, and contains not more than twenty-five (25) percent of water and not more than five (5) percent of ash.

2. *Refiners' sirup, treacle*, is the residual liquid product obtained in the process of refining raw sugars, and contains not more than twenty-five (25) percent of water and not more than eight (8) percent of ash.

Sirups.

1. *Sirup* is the sound product made by purifying and evaporating the juice of a sugar-producing plant without removing any of the sugar.

2. *Sugar-cane sirup* is sirup made by the evaporation of the juice of the sugar-cane or by the solution of sugar-cane concrete, and contains not more than thirty (30) percent of water and not more than two and five-tenths (2.5) percent of ash.

3. *Sorghum sirup* is sirup made by the evaporation of sorghum juice or by the solution of sorghum concrete, and contains not more than thirty (30) percent of water and not more than two and five-tenths (2.5) percent of ash.

4. *Maple sirup* is sirup made by the evaporation of maple sap or by the solution of maple concrete, and contains not more than thirty-two (32) percent of water and not less than forty-five hundredths (0.45) percent of maple sirup ash.

5. *Sugar sirup* is the product made by dissolving sugar to the consistence of a sirup, and contains not more than thirty-five (35) percent of water.

b. Glucose Products.

1. *Starch sugar* is the solid product made by hydrolyzing starch or a starch-containing substance until the greater part of the starch is converted into dextrose. Starch sugar appears in commerce in two forms, anhydrous starch sugar and hydrous starch sugar. The former, crystallized without water of crystallization, contains not less than ninety-five (95) percent of dextrose and not more than eight-tenths (0.8) percent of ash. The latter, crystallized with water of crystallization, is of two varieties: 70 sugar, also known as brewers' sugar, contains not less than seventy (70) percent of dextrose and not more than eight-tenths (0.8) percent of ash; 80 sugar, climax or acme sugar, contains not less than eighty (80) percent of dextrose and not more than one and one-half (1.5) percent of ash.

The ash of all these products consists almost entirely of chlorides and sulphates.

2. *Glucose, mixing glucose, confectioner's glucose*, is a thick, sirupy, colorless product made by incompletely hydrolyzing starch, or a starch-containing substance, and decolorizing and evaporating the product. It varies in density from forty-one (41) to forty-five (45) degrees Baumé at a temperature of 100° Fahr. (37.7° C.), and conforms in density, within these limits, to the degree Baumé it is claimed to show, and for a density of forty-one (41) degrees Baumé contains not more than twenty-one (21) percent, and for a density of forty-five (45) degrees not more than fourteen (14) percent of water. It contains on a basis of forty-one (41) degrees Baumé not more than one (1) percent of ash, consisting chiefly of chlorides and sulphates.

c. *Candy.*

1. *Candy* is a product made from a saccharine substance or substances with or without the addition of harmless coloring, flavoring or filling materials, and contains no terra alba, barytes, talc, chrome yellow, or other mineral substances, or poisonous colors or flavors, or other ingredients deleterious or detrimental to health, or any vinous, malt or spirituous liquor or compound, or narcotic drug.

d. *Honey.*

1. *Honey* is the nectar and saccharine exudations of plants gathered, modified and stored in the comb by honey bees (*Apis mellifica* and *A. dorsata*); is lævo-rotatory, and contains not more than twenty-five (25) percent of water, not more than twenty-five hundredths (0.25) percent of ash, and not more than eight (0.8) percent of sucrose.

2. *Comb honey* is honey contained in the cells of comb.

3. *Extracted honey* is honey which has been separated from the uncrushed comb by centrifugal force or gravity.

4. *Strained honey* is honey removed from the crushed comb by straining or other means.

D. CONDIMENTS (EXCEPT VINEGAR AND SALT).

a. *Spices.*

1. *Spices* are aromatic vegetable substances used for the seasoning of food and from which no portion of any volatile oil or other flavoring principle has been removed, and which are clean, sound and true to name.

2. *Allspice, pimento*, is the dried fruit of the *Pimenta pimenta* (L.) Karst., and contains not less than eight (8) percent of quercitanic acid,¹ not more than six (6) percent of total ash, not more than five-tenths (0.5) percent of ash insoluble in hydrochloric acid, and not more than twenty-five (25) percent of crude fiber.

3. *Anise* is the fruit of the *Pimpinella anisum* L.

¹ Calculated from the total oxygen absorbed by the aqueous extract.

4. *Bay leaf* is the dried leaf of *Laurus nobilis* L.
5. *Capers* are the flower buds of *Capparis spinosa* L.
6. *Caraway* is the fruit of *Carum carvi* L.

Cayenne and Red Peppers.

7. *Red pepper* is the red, dried, ripe fruit of any species of *Capsicum*.

8. *Cayenne pepper, cayenne*, is the dried ripe fruit of *Capsicum frutescens* L., *Capsicum baccatum* L., and some other small-fruited species of *Capsicum*, and contains not less than fifteen (15) percent of nonvolatile ether extract; not more than six and five-tenths (6.5) percent of total ash; not more than five-tenths (0.5) percent of ash insoluble in hydrochloric acid; not more than one and five-tenths (1.5) percent of starch, and not more than twenty-eight (28) percent of crude fiber.

9. *Paprika* is the dried ripe fruit of *Capsicum annum* L., or some other large-fruited species of *Capsicum*, excluding seeds and stems.

10. *Celery seed* is the dried fruit of *Apium graveolens* L.

11. *Cinnamon* is the dried bark of any species of the genus *Cinnamomum* from which the outer layers may or may not have been removed.

12. *True cinnamon* is the dried inner bark of *Cinnamomum zeylanicum* Breyne.

13. *Cassia* is the dried bark of various species of *Cinnamomum*, other than *Cinnamomum zeylanicum*, from which the outer layers may or may not have been removed.

14. *Cassia buds* are the dried immature fruit of species of *Cinnamomum*.

15. *Ground cinnamon, ground cassia*, is a powder consisting of cinnamon, cassia, or cassia buds, or a mixture of these spices, and contains not more than six (6) percent of total ash and not more than two (2) percent of sand.

16. *Cloves* are the dried flower buds of *Caryophyllus aromaticus* L., which contain not more than five (5) percent of clove stems; not less than ten (10) percent of volatile ether extract; not less than twelve (12) percent of quercitannic acid;¹ not more than eight (8) percent of total ash; not more than five-tenths (0.5) percent of ash insoluble in hydrochloric acid, and not more than ten (10) percent of crude fiber.

17. *Coriander* is the dried fruit of *Coriandrum sativum* L.

18. *Cumin seed* is the fruit of *Cuminum cyminum* L.

19. *Dill seed* is the fruit of *Anethum graveolens* L.

¹ Calculated from the total oxygen absorbed by the aqueous extract.

20. *Fennel* is the fruit of *Foeniculum foeniculum* (L.) Karst.

21. *Ginger* is the washed and dried or decorticated and dried rhizome of *Zingiber zingiber* (L.) Karst., and contains not less than forty-two (42) percent of starch; not more than eight (8) percent of crude fiber, not more than six (6) percent of total ash, not more than one (1) percent of lime, and not more than three (3) percent of ash insoluble in hydrochloric acid.

22. *Limed ginger, bleached ginger*, is whole ginger coated with carbonate of lime and contains not more than ten (10) percent of ash, not more than four (4) percent of carbonate of lime, and conforms in other respects to the standard for ginger.

23. *Horse-radish* is the root of *Roripa armoracia* (L.) Hitchcock, either by itself or ground and mixed with vinegar.

24. *Mace* is the dried arillus of *Myristica fragrans* Houttuyn, and contains not less than twenty (20) nor more than thirty (30) percent of nonvolatile ether extract, not more than three (3) percent of total ash, and not more than five-tenths (0.5) percent of ash insoluble in hydrochloric acid, and not more than ten (10) percent of crude fiber.

25. *Macassar mace, Papua mace*, is the dried arillus of *Myristica argentea* Warb.

26. *Bombay mace* is the dried arillus of *Myristica malabarica* Lamarck.

27. *Marjoram* is the leaf, flower and branch of *Majorana majorana* (L.) Karst.

28. *Mustard seed* is the seed of *Sinapis alba* L. (white mustard), *Brassica nigra* (L.) Koch (black mustard), or *Brassica juncea* (L.) Coisson (black or brown mustard).

29. *Ground mustard* is a powder made from mustard seed, with or without the removal of the hulls and a portion of the fixed oil, and contains not more than two and five-tenths (2.5) percent of starch and not more than eight (8) percent of total ash.

30. *Prepared mustard, German mustard, French mustard, mustard paste*, is a paste composed of a mixture of ground mustard seed or mustard flour with salt, spices and vinegar, and, calculated free from water, fat and salt, contains not more than twenty-four (24) percent of carbohydrates, calculated as starch, determined according to the official methods, not more than twelve (12) percent of crude fiber nor less than thirty-five (35) percent of protein, derived solely from the materials named.

31. *Nutmeg* is the dried seed of the *Myristica fragrans* Houttuyn, deprived of its testa, with or without a thin coating of lime, and contains not less than twenty-five (25) percent of nonvolatile ether extract, not more than five (5) percent of total ash, not more than five-tenths (0.5) percent of ash insoluble in hydrochloric acid, and not more than ten (10) percent of crude fiber.

32. *Macassar nutmeg, Papua nutmeg, male nutmeg, long nutmeg*, is the dried seed of *Myristica argentea* Warb. deprived of its testa.

Pepper.

33. *Black pepper* is the dried immature berry of *Piper nigrum* L. and contains not less than six (6) percent of nonvolatile ether extract, not less than twenty-five (25) percent of starch, not more than seven (7) percent of total ash, not more than two (2) percent of ash insoluble in hydrochloric acid, and not more than fifteen (15) percent of crude fiber. One hundred parts of the nonvolatile ether extract contain not less than three and one-quarter (3.25) parts of nitrogen. *Ground black pepper* is the product made by grinding the entire berry and contains the several parts of the berry in their normal proportions.

34. *Long pepper* is the dried fruit of *Piper longum* L.

35. *White pepper* is the dried mature berry of *Piper nigrum* L. from which the outer coating or the outer and inner coatings have been removed and contains not less than six (6) percent of nonvolatile ether extract, not less than fifty (50) percent of starch, not more than four (4) percent of total ash, not more than five-tenths (0.5) percent of ash insoluble in hydrochloric acid, and not more than five (5) percent of crude fiber. One hundred parts of the nonvolatile ether extract contain not less than four (4) parts of nitrogen.

36. *Saffron* is the dried stigma of *Crocus sativus* L.

37. *Sage* is the leaf of *Salvia officinalis* L.

38. *Savory, summer savory*, is the leaf, blossom, and branch of *Satureja hortensis* L.

39. *Thyme* is the leaf and tip of blooming branches of *Thymus vulgaris* L.

b. Flavoring Extracts.

1. A *flavoring extract*¹ is a solution in ethyl alcohol of proper strength of the sapid and odorous principles derived from an aromatic plant, or parts of the plant, with or without its coloring matter, and conforms in name to the plant used in its preparation.

2. *Almond extract* is the flavoring extract prepared from oil of bitter almonds, free from hydrocyanic acid, and contains not less than one (1) percent by volume of oil of bitter almonds.

2a. *Oil of bitter almonds*, commercial, is the volatile oil obtained from the seed of the bitter almond (*Amygdalus communis* L.), the apricot (*Prunus armeniaca* L.), or the peach (*Amygdalus persica* L.)

¹The flavoring extracts herein described are intended solely for food purposes and are not to be confounded with similar preparations described in the Pharmacopoeia for medicinal purposes.

3. *Anise extract* is the flavoring extract prepared from oil of anise, and contains not less than three (3) percent by volume of oil of anise.

3a. *Oil of anise* is the volatile oil obtained from the anise seed.

4. *Celery seed extract* is the flavoring extract prepared from celery seed or the oil of celery seed, or both, and contains not less than three-tenths (0.3) percent by volume of oil of celery seed.

4a. *Oil of celery seed* is the volatile oil obtained from celery seed.

5. *Cassia extract* is the flavoring extract prepared from oil of cassia and contains not less than two (2) percent by volume of oil of cassia.

5a. *Oil of cassia* is the lead-free volatile oil obtained from the leaves or bark of *Cinnamomum cassia* Bl., and contains not less than seventy-five (75) percent by weight of cinnamic aldehyde.

6. *Cinnamon extract* is the flavoring extract prepared from oil of cinnamon, and contains not less than two (2) percent by volume of oil of cinnamon.

6a. *Oil of cinnamon* is the lead-free volatile oil obtained from the bark of the Ceylon cinnamon (*Cinnamomum zeylanicum* Breyne), and contains not less than sixty-five (65) percent by weight of cinnamic aldehyde and not more than ten (10) percent by weight of eugenol.

7. *Clove extract* is the flavoring extract prepared from oil of cloves, and contains not less than two (2) percent by volume of oil of cloves.

7a. *Oil of cloves* is the lead-free volatile oil obtained from cloves.

8. *Ginger extract* is the flavoring extract prepared from ginger and contains in each one hundred (100) cubic centimeters, the alcohol-soluble matters from not less than twenty (20) grams of ginger.

9. *Lemon extract* is the flavoring extract prepared from oil of lemon, or from lemon peel, or both, and contains not less than five (5) percent by volume of oil of lemon.

9a. *Oil of lemon* is the volatile oil obtained, by expression or alcoholic solution, from the fresh peel of the lemon (*Citrus limonum* L.), has an optical rotation (25° C.) of not less than +60° in a 100-millimeter tube, and contains not less than four (4) percent by weight of citral.

10. *Terpeneless extract of lemon* is the flavoring extract prepared by shaking oil of lemon with dilute alcohol, or by dissolving terpeneless oil of lemon in dilute alcohol, and contains not less than two-tenths (0.2) percent by weight of citral derived from oil of lemon.

10a. *Terpeneless oil of lemon* is oil of lemon from which all or nearly all of the terpenes have been removed.

11. *Nutmeg extract* is the flavoring extract prepared from oil of nutmeg, and contains not less than two (2) percent by volume of oil of nutmeg.

11a. *Oil of nutmeg* is the volatile oil obtained from nutmegs.

12. *Orange extract* is the flavoring extract prepared from oil of orange, or from orange peel, or both, and contains not less than five (5) percent by volume of oil of orange.

12a. *Oil of orange* is the volatile oil obtained, by expression or alcoholic solution, from the fresh peel of the orange (*Citrus aurantium* L.) and has an optical rotation (25° C.) of not less than +95° in a 100-millimeter tube.

13. *Terpeneless extract of orange* is the flavoring extract prepared by shaking oil of orange with dilute alcohol, or by dissolving terpeneless oil of orange in dilute alcohol, and corresponds in flavoring strength to orange extract.

13a. *Terpeneless oil of orange* is oil of orange from which all or nearly all of the terpenes have been removed.

14. *Peppermint extract* is the flavoring extract prepared from oil of peppermint, or from peppermint, or both, and contains not less than three (3) percent by volume of oil of peppermint.

14a. *Peppermint* is the leaves and flowering tops of *Mentha piperita* L.

14b. *Oil of peppermint* is the volatile oil obtained from peppermint and contains not less than fifty (50) percent by weight of menthol.

15. *Rose extract* is the flavoring extract prepared from otto of roses, with or without red rose petals, and contains not less than four-tenths (0.4) percent by volume of otto of roses.

15a. *Otto of roses* is the volatile oil obtained from the petals of *Rosa damascena* Mill., *R. centifolia* L., or *R. moschata* Herrm.

16. *Savory extract* is the flavoring extract prepared from oil of savory, or from savory, or both, and contains not less than thirty-five hundredths (0.35) percent by volume of oil of savory.

16a. *Oil of savory* is the volatile oil obtained from savory.

17. *Spearmint extract* is the flavoring extract prepared from oil of spearmint, or from spearmint, or both, and contains not less than three (3) percent by volume of oil of spearmint.

17a. *Spearmint* is the leaves and flowering tops of *Mentha spicata* L.

17b. *Oil of spearmint* is the volatile oil obtained from spearmint.

18. *Star anise extract* is the flavoring extract prepared from oil of star anise, and contains not less than three (3) percent by volume of oil of star anise.

18a. *Oil of star anise* is the volatile oil distilled from the fruit of the star anise (*Illicium verum* Hook).

19. *Sweet basil extract* is the flavoring extract prepared from oil of sweet basil, or from sweet basil, or both, and contains not less than one-tenth (0.1) percent by volume of oil of sweet basil.

19a. *Sweet basil, basil*, is the leaves and tops of *Ocimum basilicum* L.

19b. *Oil of sweet basil* is the volatile oil obtained from basil.

20. *Sweet marjoram extract, marjoram extract*, is the flavoring extract prepared from the oil of marjoram, or from marjoram, or both, and contains not less than one (1) percent by volume of oil of marjoram.

20a. *Oil of marjoram* is the volatile oil obtained from marjoram.

21. *Thyme extract* is the flavoring extract prepared from oil of thyme, or from thyme, or both, and contains not less than two-tenths (0.2) percent by volume of oil of thyme.

21a. *Oil of thyme* is the volatile oil obtained from thyme.

22. *Tonka extract* is the flavoring extract prepared from tonka bean, with or without sugar or glycerin, and contains not less than one-tenth (0.1) percent by weight of coumarin extracted from the tonka bean, together with a corresponding proportion of the other soluble matters thereof.

22a. *Tonka bean* is the seed of *Coumarouna odorata* Aublet (*Dipteryx odorata* (Aubl.) Willd.).

23. *Vanilla extract* is the flavoring extract prepared from vanilla bean, with or without sugar or glycerin, and contains in one hundred (100) cubic centimeters the soluble matters from not less than ten (10) grams of the vanilla bean.

23a. *Vanilla bean* is the dried, cured fruit of *Vanilla planifolia* Andrews.

24. *Wintergreen extract* is the flavoring extract prepared from oil of wintergreen, and contains not less than three (3) percent by volume of oil of wintergreen.

24a. *Oil of wintergreen* is the volatile oil distilled from the leaves of the *Gaultheria procumbens* L.

c. *Edible Vegetable Oils and Fats.*

1. *Olive oil* is the oil obtained from the sound, mature fruit of the cultivated olive tree (*Olea europaea* L.) and subjected to the usual refining processes; is free from rancidity; has a refractive index (25° C.) not less than one and forty-six hundred and sixty ten-thousandths (1.4660) and not exceeding one and forty-six hundred and eighty ten thousandths (1.4680); and an iodine number not less than seventy-nine (79) and not exceeding ninety (90).

2. *Virgin olive oil* is olive oil obtained from the first pressing of carefully selected, hand-picked olives.

3. *Cotton-seed oil* is the oil obtained from the seeds of cotton plants (*Gossypium hirsutum* L., *G. barbadense* L., or *G. herbaceum* L.) and subjected to the usual refining processes; is free from rancidity; has a refractive index (25° C.) not less than one and forty-seven hundred ten-thousandths (1.4700) and not exceeding one and forty-seven hundred and twenty-five ten-thousandths (1.4725); and an iodine

number not less than one hundred and four (104) and not exceeding one hundred and ten (110).

4. "*Winter-yellow*" cotton-seed oil is expressed cotton-seed oil from which a portion of the stearin has been separated by chilling and pressure, and has an iodine number not less than one hundred and ten (110) and not exceeding one hundred and sixteen (116).

5. *Peanut oil*, *arachis oil*, *earthnut oil*, is the oil obtained from the peanut (*Arachis hypogaea* L.) and subjected to the usual refining processes; is free from rancidity; has a refractive index (25° C.) not less than one and forty-six hundred and ninety ten-thousandths (1.4690) and not exceeding one and forty-seven hundred and seven ten-thousandths (1.4707); and an iodine number not less than eighty-seven (87) and not exceeding one hundred (100).

6. "*Cold-drawn*" peanut oil¹ is peanut oil obtained by pressure without heating.

7. *Sesame oil*, *gingili oil*, *teel oil*, is the oil obtained from the seeds of the sesame plants (*Sesamum orientale* L. and *S. radiatum* Schum. and Thonn.) and subjected to the usual refining processes; is free from rancidity; has a refractive index (25° C.) not less than one and forty-seven hundred and four ten-thousandths (1.4704) and not exceeding one and forty-seven hundred and seventeen ten-thousandths (1.4717); and an iodine number not less than one hundred and three (103) and not exceeding one hundred and twelve (112).

8. "*Cold-drawn*" sesame oil¹ is sesame oil obtained by pressure without heating.

9. *Poppy-seed oil*¹ is the oil obtained from the seed of the poppy (*Papaver somniferum* L.) subjected to the usual refining processes and free from rancidity.

10. *White poppy-seed oil*, "*cold-drawn*" poppy-seed oil,¹ is poppy-seed oil of the first pressing without heating.

11. *Coconut oil*¹ is the oil obtained from the kernels of the coconut (*Cocos nucifera* L.) and subjected to the usual refining processes and free from rancidity.

12. *Cochin oil* is coconut oil prepared in Cochin (Malabar).

13. *Ceylon oil* is coconut oil prepared in Ceylon.

14. *Copra oil* is coconut oil prepared from copra, the dried kernels of the coconut.

15. *Rape-seed oil*, *colza oil*,¹ is the oil obtained from the seeds of the rape plant (*Brassica napus* L.) and subjected to the usual refining processes and free from rancidity.

16. "*Cold-drawn*" rape-seed oil¹ is rape-seed oil obtained by the first pressing without heating.

17. *Sunflower oil*¹ is the oil obtained from the seeds of the sun-

¹The fixing of limits for chemical and physical properties is reserved for future consideration.

flower (*Helianthus annuus* L.) and subjected to the usual refining processes and free from rancidity.

18. "Cold-drawn" sunflower oil¹ is sunflower oil obtained by the first pressing without heating.

19. Maize oil, corn oil,¹ is the oil obtained from the germ of the maize (*Zea mays* L.) and subjected to the usual refining processes and free from rancidity.

20. Cocoa butter, cacao butter, is the fat obtained from roasted, sound cocoa beans, and subjected to the usual refining processes; is free from rancidity; has a refractive index (40° C.) not less than one and forty-five hundred and sixty-six ten-thousandths (1.4566) and not exceeding one and forty-five hundred and ninety-eight ten-thousandths (1.4598), an iodine number not less than thirty-three (33) and not exceeding thirty-eight (38); and a melting point not lower than 30° C. nor higher than 35° C.

21. Cotton-seed oil stearin is the solid product made by chilling cotton-seed oil and separating the solid portion by filtration, with or without pressure, and having an iodine number not less than eighty-five (85) and not more than one hundred (100).

E. TEA, COFFEE, AND COCOA PRODUCTS.

a. Tea.

1. Tea is the leaves and leaf buds of different species of *Thea*, prepared by the usual trade processes of fermenting, drying, and firing; meets the provisions of the Act of Congress approved March 2, 1897, and the regulations made in conformity therewith (Treasury Department Circular 16, February 6, 1905); conforms in variety and place of production to the name it bears; and contains not less than four (4) nor more than seven (7) percent of ash.

b. Coffee.

1. Coffee is the seed of *Coffee arabica* L. or *Coffee liberica*, Bull., freed from all but a small portion of its spermoderm, and conforms in variety and place of production to the name it bears.

2. Roasted coffee is coffee which by the action of the heat has become brown and developed its characteristic aroma, and contains not less than ten (10) percent of fat and not less than three (3) percent of ash.

c. Cocoa and Cocoa Products.

1. Cocoa beans are the seeds of the cacao tree, *Theobroma cacao*, L.

2. Cocoa nibs, cracked cocoa, is the roasted, broken cocoa bean freed from its shell or husk.

¹The fixing of limits for chemical and physical properties is reserved for future consideration.

3. *Chocolate, plain chocolate, bitter chocolate, chocolate liquor, bitter chocolate coatings*, is the solid or plastic mass obtained by grinding cocoa nibs without the removal of fat or other constituents except the germ, and contains not more than three (3) percent of ash insoluble in water, three and fifty-hundredths (3.50) percent of crude fiber, and nine (9) percent of starch, and not less than forty-five (.5) percent of cocoa fat.

4. *Sweet chocolate, sweet chocolate coatings*, is chocolate mixed with sugar (sucrose), with or without the addition of cocoa butter, spices, or other flavoring materials, and contains in the sugar and fat-free residue no higher percentage of either ash, fiber, or starch than is found in the sugar and fat-free residue of chocolate.

5. *Cocoa, powdered cocoa*, is cocoa nibs, with or without the germ, deprived of a portion of its fat and finely pulverized, and contains percentages of ash, crude fiber, and starch corresponding to those in chocolate after correction for fat removed.

6. *Sweet cocoa, sweetened cocoa*, is cocoa mixed with sugar (sucrose), and contains not more than sixty (60) percent of sugar (sucrose), and in the sugar and fat-free residue no higher percentage of either ash, crude fiber, or starch than is found in the sugar and fat-free residue of chocolate.

F. BEVERAGES.

a. *Fruit Juices—Fresh, Sweet, and Fermented.*

1. Fresh, and 2. Sweet.

(Schedules in preparation.)

3. Fermented Fruit Juices.

1. *Wine* is the product made by the normal alcoholic fermentation of the juice of sound, ripe grapes, and the usual cellar treatment, and contains not less than seven (7) nor more than sixteen (16) percent of alcohol, by volume, and, in one hundred (100) cubic centimeters (20° C.), not more than one tenth (0.1) gram of sodium chlorid nor more than two-tenths (0.2) gram of potassium sulphate; and for red wine not more than fourteen hundredths (0.14) gram, and for white wine not more than twelve hundredths (0.12) gram of volatile acids produced by fermentation and calculated as acetic acid. *Red wine* is wine containing the red coloring matter of the skins of grapes. *White wine* is wine made from white grapes or the expressed fresh juice of other grapes.

2. *Dry wine* is wine in which the fermentation of the sugars is practically complete and which contains, in one hundred (100) cubic centimeters (20° C.), less than one (1) gram of sugars, and for dry

red wine not less than sixteen hundredths (0.16) gram of grape ash and not less than one and six-tenths (1.6) grams of sugar-free grape solids, and for dry white wine not less than thirteen hundredths (0.13) gram of grape ash and not less than one and four tenths (1.4) grams of sugar-free grape solids.

3. *Fortified dry wine* is dry wine to which brandy has been added, but which conforms in all other particulars to the standard of dry wine.

4. *Sweet wine* is wine in which the alcoholic fermentation has been arrested, and which contains, in one hundred (100) cubic centimeters (20° C.), not less than one (1) gram of sugars, and for sweet red wine not less than sixteen hundredths (0.16) gram of grape ash, and for sweet white wine not less than thirteen hundredths (0.13) gram of grape ash.

5. *Fortified sweet wine* is sweet wine to which wine spirits have been added. By Act of Congress, "sweet wine" used for making fortified sweet wine and "wine spirits" used for such fortification are defined as follows (Sec. 43, Act of October 1, 1890, 26 Stat. 567, as amended by Section 68, Act of August 27, 1894, 28 Stat. 509, and further amended by Act of Congress approved June 7, 1906): "That the wine spirits mentioned in Section 42 of this Act is the product resulting from the distillation of fermented grape juice to which water may have been added prior to, during, or after fermentation, for the sole purpose of facilitating the fermentation and economical distillation thereof, and shall be held to include the products from grapes, or their residues, commonly known as grape brandy; and the pure sweet wine, which may be fortified free of tax, as provided in said section, is fermented grape juice only, and shall contain no other substance whatever introduced before, at the time of, or after fermentation, except as herein expressly provided; and such sweet wine shall contain not less than four (4) percentum of saccharine matter, which saccharine strength may be determined by testing with Balling's saccharometer or must scale, such sweet wine, after the evaporation of the spirits contained therein, and restoring the sample tested to original volume by addition of water: *Provided*, that the addition of pure boiled or condensed grape must or pure crystallized cane or beet sugar or pure anhydrous sugar to the pure grape juice aforesaid, or the fermented product of such grape juice prior to the fortification provided by this Act for the sole purpose of perfecting sweet wine according to commercial standard, or the addition of water in such quantities only as may be necessary in the mechanical operation of grape conveyors, crushers, and pipes leading to fermenting tanks, shall not be excluded by the definition of pure sweet wine aforesaid: *Provided, however*, that the cane or beet sugar, or pure anhydrous sugar, or water, so used shall not in either case be in excess of ten (10)

percentum of the weight of the wine to be fortified under this Act: And *provided further*, that the addition of water herein authorized shall be under such regulations and limitations as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may from time to time prescribe; but in no case shall such wines to which water has been added be eligible for fortification under the provisions of this Act where the same, after fermentation and before fortification, have an alcoholic strength of less than five (5) percentum of their volume."

6. *Sparkling wine* is wine in which the after part of the fermentation is completed in the bottle, the sediment being disgorged and its place supplied by wine or sugar liquor, and which contains, in one hundred (100) cubic centimeters (20° C.), not less than twelve hundredths (0.12) gram of grape ash.

7. *Modified wine, ameliorated wine, corrected wine*, is the product made by the alcoholic fermentation, with the usual cellar treatment, of a mixture of the juice of sound, ripe grapes with sugar (sucrose), or a syrup containing not less than sixty-five (65) percent of sugar (sucrose), and in quantity not more than enough to raise the alcoholic strength after fermentation to eleven (11) percent by volume.

8. *Raisin wine* is the product made by the alcoholic fermentation of an infusion of dried or evaporated grapes, or of a mixture of such infusion or of raisins with grape juice.

b. *Mead, Root Beer, etc.*

(Schedule in preparation.)

c. *Malt Liquors.*

(Schedule in preparation.)

d. *Spirituuous Liquors.*

(Schedule in preparation.)

e. *Carbonated Waters, etc.*

(Schedule in preparation.)

G. VINEGAR.

1. *Vinegar, cider vinegar, apple vinegar*, is the product made by the alcoholic and subsequent acetous fermentations of the juice of apples, is laevo-rotatory, and contains not less than four (4) grams of acetic acid, not less than one and six tenths (1.6) grams of apple solids, of which not more than fifty (50) percent are reducing sugars,

and not less than twenty-five hundredths (0.25) gram of apple ash in one hundred (100) cubic centimeters (20° C.); and the water-soluble ash from one hundred (100) cubic centimeters (20° C.) of the vinegar contains not less than ten (10) milligrams of phosphoric acid (P_2O_5), and requires not less than thirty (30) cubic centimeters of decinormal acid to neutralize its alkalinity.

2. *Wine vinegar, grape vinegar*, is the product made by the alcoholic and subsequent acetous fermentations of the juice of grapes and contains, in one hundred (100) cubic centimeters (20° C.), not less than four (4) grams of acetic acid, not less than one (1.0) gram of grape solids, and not less than thirteen hundredths (0.13) gram of grape ash.

3. *Malt vinegar* is the product made by the alcoholic and subsequent acetous fermentations, without distillation, of an infusion of barley malt or cereals whose starch has been converted by malt, is dextro-rotatory, and contains, in one hundred (100) cubic centimeters (20° C.), not less than four (4) grams of acetic acid, not less than two (2) grams of solids, and not less than two tenths (0.2) gram of ash; and the water-soluble ash from one hundred (100) cubic centimeters (20° C.) of the vinegar contains not less than nine (9) milligrams of phosphoric acid (P_2O_5), and requires not less than four (4) cubic centimeters of decinormal acid to neutralize its alkalinity.

4. *Sugar vinegar* is the product made by the alcoholic and subsequent acetous fermentations of solutions of sugar, sirup, molasses, or refiners' syrup, and contains, in one hundred (100) cubic centimeters (20° C.), not less than four (4) grams of acetic acid.

5. *Glucose vinegar* is the product made by the alcoholic and subsequent acetous fermentations of solutions of starch sugar or glucose, is dextro-rotatory, and contains, in one hundred (100) cubic centimeters (20° C.), not less than four (4) grams of acetic acid.

6. *Spirit vinegar, distilled vinegar, grain vinegar*, is the product made by the acetous fermentation of dilute distilled alcohol, and contains, in one hundred (100) cubic centimeters (20° C.), not less than four (4) grams of acetic acid.

III. SALT.

1. *Table salt, dairy salt*, is fine-grained crystalline salt containing on a water-free basis, not more than one and four-tenths (1.4) percent of calcium sulphate ($CaSO_4$), nor more than five-tenths (0.5) percent of calcium and magnesium chlorids ($CaCl_2$ and $MgCl_2$), nor more than one-tenth (0.1) percent of matters insoluble in water.

IV. PRESERVATIVES AND COLORING MATTERS.

(Schedules in preparation.)

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